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Volume A.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [illegible] 1912.

No. [illegible] 554.

STANDARD SANITARY MANUFACTURING COMPANY ET AL., APPELLANTS,

vs.

THE UNITED STATES OF AMERICA.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND.

PLEADINGS, ORDERS, &c.

FILED FEBRUARY 16, 1912.

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(23,064)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. 988.

STANDARD SANITARY MANUFACTURING COMPANY ET AL., APPELLANTS,

vs.

THE UNITED STATES OF AMERICA.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND.

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UNITED STATES OF AMERICA,
District of Maryland, To wit:

At a Circuit Court of the United States in and for the Maryland District, Begun and Held at the City of Baltimore on the First Monday in November (Being the Sixth Day of the Same Month), in the Year of Our Lord One Thousand Nine Hundred and Eleven.

Present:

The Honorable Nathan Goff, U. S. Circuit Judge.
Jeter C. Pritchard, U. S. Circuit Judge.
Thomas J. Morris, Judge Maryland District.
John C. Rose, Judge Maryland District.
John Philip Hill, Esq., Attorney.
George W. Padgett, Esq., Marshal.
Arthur L. Spamer, Clerk.

Among others were the following proceedings, to wit:

In Equity.

UNITED STATES OF AMERICA, Petitioner,
vs.
STANDARD SANITARY MANUFACTURING COMPANY, A. WEISKITTEL & Co., The Barnes Manufacturing Company, The Cahill Iron Works, Colwell Lead Company, The Day-Ward Company, The Humphreys Manufacturing Company, Kerner Manufacturing Company, The J. L. Mott Iron Works, McVay & Walker, The McCrum-Howell Company, The National Sanitary Manufacturing Company, Union Sanitary Manufacturing Company, United States Sanitary Manufacturing Company, L. Wolff Manufacturing Company, Wheeling Enameled Iron Company, Theodore Ahrens, Frank J. Torrance, E. L. Dawes, W. A. Myler, Anton Weiskittel, John D. Heise, C. H. Voegele, T. R. Barnes, F. H. Caldwell, J. J. Mahoney, Jesse T. Duryea, Bert O. Tilden, W. C. Winfield, A. G. Ward, S. N. Ford, Reid Carpenter, J. A. Frauenheim, Jordan L. Mott, Max Goebel, Thomas Walker, Alexander C. Walker, Lloyd G. McCrum, Howard G. Gates, Frank G. Borden, D. W. Davis, L. C. Huesman, E. V. Bringham, Charles Arrott, A. H. Kline, Jr., Ludwig Wolff, Herman Hoelscher, J. E. Wright, George W. Franzheim and Edwin L. Wayman, Defendants.

Petition in Equity.

Filed July 22, 1910.

In the Circuit Court of the United States for the District of Maryland.

No. —.

UNITED STATES OF AMERICA, Petitioner,
v.
STANDARD SANITARY MANUFACTURING COMPANY AND OTHERS,
Defendants.

To the Honorable Judges of the Circuit Court of the United States for the District of Maryland, sitting in equity.

The United States of America, by John Philip Hill, its attorney for the district of Maryland, acting under the direction of the Attorney-General, brings this proceeding in equity against—

Standard Sanitary Manufacturing Company.
A. Weiskittel & Co.
The Barnes Manufacturing Company.
The Cahill Iron Works.
Colwell Lead Company.
The Day-Ward Company.
The Humphreys Manufacturing Company.
Kerner Manufacturing Company.
The J. L. Mott Iron Works.
McVay & Walker.
The McCrum-Howell Company.
The National Sanitary Manufacturing Company
Union Sanitary Manufacturing Company.
United States Sanitary Manufacturing Company
L. Wolff Manufacturing Company.
Wheeling Enameled Iron Company.
Theodore Ahrens.
Francis J. Torrance.
E. L. Dawes.
W. A. Myler.
Anton Weiskittel.
John D. Heise.
C. H. Voegele.
T. R. Barnes.
F. H. Caldwell.
J. J. Mahoney.
Jesse T. Duryeo.
Bert O. Tilden.
W. C. Winfield.
A. G. Ward.
S. N. Ford.
Reid Carpenter.

J. A. Frauenheim.
Jordan L. Mott.
Max Goebel.
Thomas Walker.
Alexander C. Walker.
Lloyd G. McCrum.
Howard G. Gates.
Frank G. Borden.
D. W. Davis.
L. C. Huesman.
E. V. Bringham.
Charles Arrott.
A. H. Kline, Jr.
Ludwig Wolff.
Herman Hoelscher.
J. E. Wright.
George W. Franzheim.
Edwin L. Wayman.

The defendants above named, engaged in interstate and foreign trade and commerce in sanitary enameled iron ware, are violating the provisions of the act of Congress passed July 2, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies," and this proceeding is instituted to prevent and restrain the hereinafter particularly described contracts, combinations, and conspiracies in restraint of trade in sanitary enameled iron ware among the several States and with foreign nations.

On information and belief your petitioner alleges and shows:

I.

1. Standard Sanitary Manufacturing Company is a corporation organized under the laws of the State of New Jersey, with its principal offices at Pittsburg, Pa., in the Bessemer Building.

A. Weiskittel & Son Company is a corporation organized under the laws of the State of Delaware, with its principal office in the city of Baltimore, Md.

The Barnes Manufacturing Company is a corporation organized under the laws of the State of Ohio, with its principal office at Mansfield, Ohio.

The Cahill Iron Works is a corporation organized under the laws of the State of Tennessee, with its principal office at Chattanooga, Tenn.

Colwell Lead Company is a corporation organized under the laws of the State of New York, with its principal office at New York City, N. Y.

The Day-Ward Company is a corporation organized under the laws of the State of Ohio, with its principal office at Warren, Ohio.

The Humphreys Manufacturing Company is a corporation organized under the laws of the State of Ohio, with its principal office at Mansfield, Ohio.

Kerner Manufacturing Company is a corporation organized under

the laws of the State of Penn-sylvania, with its principal office at Pittsburg, Pa.

The J. L. Mott Iron Works is a corporation organized under the laws of the State of New York, with its principal office at New York City, N. Y.

McVay & Walker is a corporation organized under the laws of the State of Pennsylvania, with its principal office at Braddock, Pa.

The McCrum-Howell Company is a corporation organized under the laws of the State of Connecticut, with its principal office at New York City, N. Y.

The National Sanitary Manufacturing Company is a corporation organized under the laws of the State of Ohio, with its principal office at Salem, Ohio.

Union Sanitary Manufacturing Company is a corporation organized under the laws of the State of Indiana, with its principal office at Noblesville, Ind.

United States Sanitary Manufacturing Company is a corporation organized under the laws of the State of Pennsylvania, with its principal office at Pittsburg, Pa.

L. Wolff Manufacturing Company is a corporation organized under the laws of the State of Illinois, with its principal office at Chicago, Ill.

Wheeling Enameled Iron Company is a corporation organized under the laws of the State of West Virginia, with its principal office at Wheeling, W. Va.

Theodore Ahrens, Francis J. Torrance, E. L. Dawes, and W. A. Myler are president, first vice-president, second vice-president, and treasurer, respectively, of the Standard Sanitary Manufacturing Company.

Said defendants will be hereinafter referred to as "corporation defendants" and "defendants."

The individuals made defendants herein and hereinafter called "individual defendants" and "defendants" are, respectively, officers of the several corporation defendants as follows:

Anton Weiskittel and John D. Heise are president and secretary, respectively, of A. Weiskittel & Son Company and reside in the City of Baltimore, Md.

C. H. Voegele and T. R. Barnes are, respectively, president and secretary of The Barnes Manufacturing Company.

F. H. Caldwell and J. J. Mahoney are, respectively, president and vice-president of The Cahill Iron Works.

Jesse T. Duryea and Bert O. Tilden are, respectively, president and secretary of the Colwell Lead Company.

W. C. Winfield and A. G. Ward are, respectively, president and vice-president of The Day-Ward Company.

S. N. Ford and Reid Carpenter are, respectively, president and secretary of The Humphreys Manufacturing Company.

J. A. Frauenheim is president of the Kerner Manufacturing Company.

Jordan L. Mott and Max Goebel are, respectively, president and secretary of The J. L. Mott Iron Works.

Thomas Walker and Alexander C. Walker are, respectively, president and director of McVay & Walker.

Lloyd G. McCrum and Howard G. Gates are, respectively, president and secretary of The McCrum-Howell Company.

Frank G. Borden and D. W. Davis are, respectively, president and secretary of The National Sanitary Manufacturing Company.

L. C. Huesman and E. V. Bringham are, respectively, president and secretary of the Union Sanitary Manufacturing Company.

Charles Arrott and A. H. Kline, jr., are, respectively, president and secretary of the United States Sanitary Manufacturing Company.

Ludwig Wolff and Herman Hoelscher are, respectively, president and secretary of the L. Wolff Manufacturing Company.

J. E. Wright and George W. Franzheim are, respectively, president and secretary of the Wheeling Enameled Iron Company.

Edwin L. Wayman is a resident of Pittsburg, with offices in the Arrott Building in that city.

All of said individual defendants, except Edwin L. Wayman, are directors of the corporation defendants, of which they are, respectively, officers as aforesaid, and as such officers and directors participate in the management and direction of the business of the corporation defendants, of which they are respectively officers and directors, and are responsible therefor.

II.

All of the defendants above named have been for many years and now are engaged in the manufacture of sanitary enameled iron ware, such as bath tubs, washbowls, lavatories, drinking fountains, sinks, closets, urinals, etc., at their several factories, located respectively as follows:

Standard Sanitary Manufacturing Company, at Allegheny and New Brighton, Pa., and Louisville, Ky.

A. Weiskittel & Son Company, at Baltimore Md.

The Barnes Manufacturing Company, at Mansfield, Ohio.

The Cahill Iron Works, at Chattanooga, Tenn.

Colwell Lead Company, at Elizabeth, N. J.

The Day-Ward Company, at Warren, Ohio.

The Humphreys Manufacturing Company, at Mansfield, Ohio.

Kerner Manufacturing Company, at Zelienople, Pa.

The J. L. Mott Iron Works, at Trenton, N. J.

McVay & Walker, at Braddock, Pa.

The McCrum-Howell Company, at Uniontown, Pa., and Norwich, Conn.

The National Sanitary Manufacturing Company, at Noblesville, Ind.

Union Sanitary Manufacturing Company, at Noblesville, Ind.

United States Sanitary Manufacturing Company, at Monaco, Pa.

L. Wolff Manufacturing Company, at Chicago, Ill., and Trenton, N. J.

Wheeling Enameled Iron Company, at Wheeling, W. Va.

The defendants above named for many years have been and now are engaged in selling and shipping from their several places of manufacture said products of enameled iron ware into States of the United States other than those wherein the said articles have been manufactured as aforesaid and in selling and shipping said products to foreign countries. All of the defendants have agents in different parts of the United States who solicit orders for their products, which are then shipped pursuant to such orders from the several factories of defendants to customers placing the orders, such customers being located in other States than those wherein the factories are situated, or shipped to such agents of the defendants who are also located in other States. All the defendants sell and ship their products generally throughout the United States, and to a less extent to foreign countries, and so are engaged in interstate and foreign trade and commerce in enameled iron ware within the meaning of the act of Congress of July 2, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies."

The only manufacturers and dealers in articles of similar character, that is, sanitary enameled iron ware, located in the United States, other than the defendants above named, are J. M. Kohler Sons Company, of Sheboygan, Wis.; the Iron City Sanitary Manufacturing Company, of Pittsburg, Pa.; the Blairsville Enameled Ware Company, of Blairsville, Pa.; the Clymer Manufacturing Company, of Indiana, Pa.; Louis Lipp, of Cincinnati, Ohio; and Washington Iron Works, of Los Angeles, Cal.

Of the total volume of the interstate and foreign business, trade and commerce in said products of sanitary enameled iron ware being carried on by the defendants and by their six competitors, above named, the defendants have and control the principal part; that is to say, 85 per cent thereof.

The defendants and their said competitors would severally be now conducting their said interstate and foreign business, trade, and commerce in sanitary enameled iron ware each in competition with the others as to the prices at which they are selling their commodities, as to the terms and conditions of sale in said interstate and foreign business, as to customers and extent and distribution of output, and as to all other matters in respect to which genuine competitors naturally compete if the said defendants had not engaged in the unlawful combination and conspiracy in restraint of said trade and commerce and in the unlawful attempt to monopolize the same, which will be hereinafter described.

III.

Sometime during the latter part of the year 1909, or early in 1910, the exact date being unknown to petitioner, the defendants unlawfully and knowingly engaged in a combination and conspiracy in restraint of the interstate and foreign trade and commerce in sanitary enameled iron ware above described, and since that time they have been continuously and are now engaged in such combination and

conspiracy, whereby such interstate and foreign trade and commerce has been and is now being restrained in the following manner:

The defendants by agreement have eliminated and suppressed all competition between each other as to the prices at which they are selling in interstate and foreign commerce their products of sanitary enameled iron ware, and they have fixed and established and are now maintaining uniform prices and terms of sale to their respective customers. The discounts which the defendants quote and allow to jobbers in carrying on such commerce are arrived at by agreement between defendants, and each defendant quotes and allows such discounts only as are agreed upon, known to, and accepted by the other defendants.

Defendants have determined upon and are observing a uniform method of selling their products of sanitary enameled iron ware to jobbers under written contracts whereby each jobber is compelled to sell at certain fixed resale prices. These contracts are the same to all jobbers throughout the United States. No defendant will sell in said commerce any sanitary enameled iron ware except pursuant to the terms of these uniform contracts, which establish uniform resale prices which jobbers must observe in sales to their customers. Under the terms of the combination no defendant will sell to any jobber who has not signed such a contract and agreed to sell at such resale prices. No defendant will sell to any jobber who is buying any sanitary enameled iron ware from other manufacturers than those who are parties to the combination.

No defendant will sell any of its products in such commerce to any person or company who is not recognized by all the defendants as a jobber. That is to say, all the defendants confine their sales to such persons as all the defendants consider to be legitimate jobbers of sanitary enameled iron ware.

The result of the combination is that to-day throughout the United States all purchasers and users of the aforesaid products of sanitary enameled iron ware are obliged to pay the same prices, which have been and are now fixed by the defendants by mutual agreement and without competition with each other.

The defendants have devised means by which each of them is advised of the amount of the output of each of the other defendants in order that thereby they may by agreement limit and restrict their respective outputs as may seem advisable.

The defendants have divided the United States into certain territorial or geographical zones, and by their system of contracts are restricting each jobber in making sales to the zone in which that jobber is located; in other words, the arrangement is such that no jobber is allowed to sell outside his zone. This feature is designed to restrict the competition of jobbers, and to enable the manufacturers to hold the jobbers firmly to the selling arrangement and to the resale prices fixed by the combination.

The defendants by agreement have largely and unreasonably increased the prices at which they sell their products to jobbers, and more particularly they have advanced the resale prices of jobbers by their system of contracts controlling resale prices.

The defendants are cooperating in fighting the manufacturers of sanitary enameled iron ware and dealers therein in interstate commerce who have not become parties to the combination, and all defendants have united and are now engaged in a common effort to force such manufacturers and dealers into the combination or else to drive them out of business. As a means to that end defendants are refusing to sell to jobbers of sanitary enamelel iron ware who are buying from manufacturers who are not members of the combination, and defendants will sell only to such jobbers as agree to confine their purchases to the members of the combination.

The defendants have established and are enforcing a system of severe penalties which are imposed upon such members of the combination as depart from the rules respecting prices and terms of sale fixed by the combination; that is to say, if any defendant sells at discounts or prices or terms of sale other than those agreed upon by all the defendants he is obliged to forfeit a heavy penalty, which is paid into a common fund of the defendants.

IV.

The defendants have at all times recognized that a combination of the character hereinabove described is unlawful, being contrary to the provisions of the Sherman antitrust act, and they know full well that engaging in such a combination and conspiracy is a continuous violation of that act. However, the defendants, as previously stated, have been and are now engaging in said combination and furthermore they have tried and are now trying to conceal their true purposes and the real character of the combination by the adoption of a plan intended by them to give to their acts a lawful aspect and to the combination a legal form.

By the conditional assignment, for a nominal consideration, of three patents on certain tools owned and used by three of the defendants in the manufacture of some of their products of enameled iron ware, to defendant Edwin L. Wayman, who was selected as assignee by agreement of all the defendants, and by a system of license agreements to manufacture and sell enameled iron ware, entered into ostensibly under those patents by all the corporation defendants, and other license agreements to sell, entered into by jobbers, defendants have sought and are now seeking to accomplish and are accomplishing all the unlawful objects, purposes, and results hereinabove described in Division III (pp. 11-14).

As previously stated, all the defendants were and are manufacturing sanitary enameled ironware, such as bathtubs, washbowls, lavatories, drinking fountains, sinks, closets, urinals, etc., and were and are selling and shipping their products throughout the United States and abroad and so are engaged in interstate and foreign trade and commerce and have been so engaged for many years. These products were and are manufactured under different patents and a variety of processes by the various defendants. All of the defendants determined and agreed that three competing patents, being patents for tools called "dredger for pulverulent material." "pneumatic sieve" and "enameling powder distributor" respectively should be

assigned by three defendant[illegible]ch of whom owned one patent, to defendant E. L. Wayman, each patent for a nominal consideration and subject to reassignment at the expiration of a short term on the demand of the party making the assignment to Wayman. In accordance with this agreement the following patents were assigned to Wayman: The Arroot patent, No. 633,941, by the Standard Sanitary Manufacuring Company; the Dithridge patent, No. 949,625, by the J. L. Mott Iron Works; the Lindsay patent, No. 939,918, by L. Wolff Manufacturing Company.

These patents, and the tools they cover, while useful and valuable in the manufacture of sanitary enameled iron ware, are not essential thereto. Moreover, they do not apply to and are not used in the manufacture of a large number of articles specified in the price list, hereto attached as a part of this bill (Exhibit 11), the sale of which articles in inter-state commerce, like the sale of all articles manufactured and sold by defendants, is controlled by the licensing arrangement. All the defendants had for years manufactured their products, without using such patents, by other patents and methods equally serviceable and almost as economical. The sole purpose of the assignment was that the patents might screen the real intent of the defendants and serve as a mere subterfuge and a device to evade the Sherman antitrust law.

Before the assignments were made all the defendants had agreed upon all the essential features of the licensing arrangement. They had determined upon all the principal conditions and terms of the contracts to be entered into by the manufacturers with Wayman, ostensible licensor; upon the jobbers' licensing agreements; upon the resale prices at which jobbers should sell in interstate commerce to plumbers, retailers, and consumers. They had agreed upon a price list wherein were stated all the articles of sanitary enameled iron ware made by all of the defendants and in which were specified the prices at which those articles should be sold by the defendants throughout the United States and the re-sale prices which jobbers should observe in making sales of the same articles to their customers. In other words, this price list arrived at by agreement and consultation between defendants and without competition between them fixes the price which every user of sanitary enameled iron ware in the United States must pay for every article manufactured by the defendants.

Copies of the manufacturers' license agreement, the jobbers' license agreement, and the price list are attached hereto and made parts of this petition, numbered Exhibits 8, 9, and 10, respectively.

Exhibits 1-7, attached hereto and made parts of this petition, evidence the manner in which the licensing arrangement was arrived at.

Exhibits 11-17, also attached hereto as parts of this petition, illustrate the methods of defendants and the effect of the combination upon independent manufacturers and jobbers who have not signed the license agreements.

To repeat, all the terms and conditions of all the contracts and agreements which together make up the licensing arrangement had

been agreed upon by all the defendants prior to the assignment of the patents to Wayman. Furthermore, each defendant stipulated as a condition to his executing the license agreement that all the others should execute a similar agreement. No defendant would have executed the agreement unless he had been certain that all the other defendants would execute it. The agreement on the part of all the defendants to enter into the license arrangement was a condition precedent to the assignment of the patents to Wayman. There would have been no such assignment to Wayman and no licensing agreement with any if all the corporation defendants had not agreed to go into the scheme. In fact, all the parties to the agreement were not and are not seeking the use of a valid and essential patent, necessary in the carrying on of their business, but were and are establishing and maintaining a price-fixing plan designed to eliminate all rivalry between them and deprive the public of the advantages which flow from free and unrestrained competition.

V.

Petitioner charges on information and belief, that the defendants are now engaged in a combination and conspiracy in restraint of interstate and foreign trade and commerce in sanitary enameled iron ware, whereby said trade and commerce is being and is now restrained, in that all competition between the defendants as to the prices, discounts, terms, and conditions of sale of their products of sanitary enameled iron ware and the amount of their respective outputs in interstate and foreign commerce has been and is now being eliminated and destroyed by the so-called license arrangement hereinabove described, which was deliberately entered into and is now being observed by all the defendants for the express purpose of preventing and suppressing that competition.

Defendants are acting in concert to force into their combination the manufacturers of and dealers in sanitary enameled iron ware who are not parties to the combination or to drive them out of interstate and foreign trade and commerce. As a means to that end defendants have refused and are refusing to sell to jobbers or purchasers of sanitary enameled iron ware who have bought or are buying from the manufacturers who are not members of the combination, and defendants by agreement among themselves restrict the sales of their products in interstate commerce to jobbers who agree to deal only with the members of the combination.

Defendants have obtained by their combination control of 85 per cent of the interstate and foreign trade and commerce in sanitary enameled iron ware and thereby they have acquired the power to advance, and have advanced, the prices for which said products are sold in such commerce, and they intend further to advance said prices, by agreement and without competition, to the grave harm and injury of the people of the United States unless restrained by this honorable court.

The petitioner further charges that defendants have engaged and are now engaging in the combination hereinabove described and

have done and are doing all the acts referred to in this petition with the intent to monopolize the interstate and foreign trade and commerce in sanitary enameled iron ware and that they have attempted and are now attempting to monopolize said commerce by engaging and continuing to engage in the combination hereinabove described.

VI.

Jurisdiction.

Petitioner avers that the combination and conspiracy to restrain the interstate and foreign trade and commerce in sanitary enameled iron ware still exists; that the defendants are carrying out the same within the State and district of Maryland and that many of the things herein complained of have been committed in whole and others in part within said State and district and are now being committed therein; that the defendants A. Weiskittel & Co., and Anton Weiskittel and John D. Heise are located and doing business within said State and district and said individual defendants reside therein.

VII.

Prayer.

In consideration whereof, and inasmuch as your orator can only have adequate relief in the premises in this honorable court, where matters of this nature are properly cognizable and relievable, your orator prays:

1. That it be adjudged that the defendants above named have entered into and are now engaged in a combination or conspiracy in restraint of trade and commerce among the several States and with foreign nations in sanitary enameled iron ware, such as the act of Congress of July 2, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies" denounces as illegal; and that the defendants be enjoined and prohibited from doing anything in pursuance or in furtherance of the same within the jurisdiction of the United States.

2. That it be adjudged that the said patents, Nos. 633941, 949625, and 939918, now claimed to be held and owned by the defendant, Edwin L. Wayman, were acquired and are now held by him in virtue of such combination and conspiracy in restraint of trade and commerce among the several States and with foreign nations, and solely to effectuate the unlawful objects and purposes of the same, and that the said Wayman be enjoined from exercising or attempting to exercise any control, direction, supervision, or influence whatever over the interstate or foreign commerce business of the other defendants by virtue of his holding said patents or otherwise.

3. That it be adjudged that the manufacturers' license agreements and the jobbers' license agreements and the price list hereinbefore described were devised, planned, entered into, and are now being

observed and enforced solely for the purpose of enabling the defendants to carry into effect the objects and purposes of said unlawful combination and conspiracy in restraint of said interstate and foreign trade and commerce; that the said agreements and price list be declared illegal, and that the defendants and all and each of them and their officers, agents, servants, and employees be enjoined and prohibited from doing anything in pursuance or in furtherance of said manufacturers' license agreements and jobbers' license agreements, and from enforcing in any manner said agreements or any of the terms thereof and from adopting or enforcing said price list in interstate and foreign commerce.

4. That it be adjudged that the defendants have attempted and are now attempting to monopolize the interstate and foreign trade and commerce in sanitary enameled iron ware by means of the unlawful combination and conspiracy hereinbefore described, and more particularly by means of said manufacturers' license agreements and jobbers' license agreements, and that the defendants be enjoined from continuing said unlawful attempt to monopolize said trade and commerce by the means referred to or by any other means similar thereto.

5. That the defendants and all and each of them be enjoined and prohibited from entering into or continuing any similar combiation or conspiracy, and from agreeing, combining, conspiring, and acting together to prevent each and any of them from carrying on interstate and foreign trade and commerce in sanitary iron ware in competition with the others.

6. That the United States may have such other and further relief as the nature of the case may require and the court may deem proper in the premises.

To the end, therefore, that the United States of America may obtain the relief to which it is justly entitled in the premises, may it please your honors to grant unto it writs of subpœna directed to the said defendants, Standard Sanitary Manufacturing Company, A. Weiskittel & Company, The Barnes Manufacturing Company, The Cahill Iron Works, Colwell Lead Company, The Day-Ward Company, The Humphreys Manufacturing Company, Kerner Manufacturing Company, The J. L. Mott Iron Works, McVay & Walker, The McCrum-Howell Company, The National Sanitary Manufacturing Company, Union Sanitary Manufacturing Company, United States Sanitary Manufacturing Company, L. Wolff Manufacturing Company, Wheeling Enameled Iron Company, Theodore Ahrens, Francis J. Torrance, E. L. Dawes, W. A. Myler, Anton Weiskittel, John D. Heise, C. H. Voegele, T. R. Barnes, F. H. Caldwell, J. J. Mahoney, Jesse T. Duryea, Bert O. Tilden, W. C. Winfield, A. G. Ward, S. N. Ford, Reid Carpenter, J. A. Frauenheim, Jordan L. Mott, Max Goebel, Thomas Walker, Alexander C. Walker, Lloyd G. McCrum, Howard G. Gates, Frank G. Borden, D. W. Davis, L. C. Huesman, E. V. Bringham, Charles Arrott, A. H. Cline, Jr., Ludwig Wolff, Herman Hoelscher, J. E. Wright, George W. Franzheim, Edwin L. Wayman, and each and every one of them, commanding

them and each of them to appear herein and answer the allegations contained in the foregoing petition and abide by and perform such orders and decree as the court may make in the premises.

GEORGE W. WICKERSHAM,
Attorney-General.
WILLIAM S. KENYON,
Assistant to the Attorney-General.
EDWIN P. GROSVENOR,
Special Assistant to the Attorney-General.
JOHN PHILIP HILL,
United States Attorney.

Edwin P. Grosvenor, being duly sworn, deposes and says that he has read the foregoing petition and knows the contents thereof; that the same is true to his own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

EDWIN P. GROSVENOR.

Sworn to before me this 22 day of July, 1910.

ARTHUR L. SPAMER,
Clerk U. S. District Court for the District of Maryland,
By CHAS. W. ZIMMERMANN,
Deputy.

EXHIBIT 1.

Resolution.

MARCH 30, 1910.

Resolved, That the matter of license agreement and resale agreement be referred to a special committee of five (5); said committee to be elected at this meeting and to be known as the price and schedule committee, which committee shall be elected directly, should the motion to adopt this resolution prevail.

This committee shall interview the various manufacturers, obtaining their consent as evidenced by their signatures to the above-mentioned agreements. And when the consent of 85 per cent of the production is had, the agreements shall become binding and effective.

The committee is authorized to levy a special assessment equal to the amount of one quarter's dues as now paid into the association. The proceeds of said special assessment to be used for the purpose of defraying the necessary expenses incurred in carrying into effect the object for which this convention was called.

The undersigned agree to the above conditions and in so append-

ing their signatures hereby agree to give their prompt cooperation to the matter in question.

Witness their hands and seals of the parties hereto:

THE CAHILL IRON WORKS,
Per F. H. CALDWELL, *Pres.*
Per E. L. WAYMAN.
THE DAY WARD CO.,
Per A. G. WARD, *V. P.*
BLAIRSVILLE ENAMELED WARE CO.,
F. D. COATS, *Prest.*
UNITED STATES SANITARY MFG. CO.,
C. F. AVIOTT, *Prest.*
THE J. L. MOTT IRON WORKS,
E. HAMMANN.
(Subject to confirmation or revocation by our general manager, John Reid.)
THE BARNES MFG. CO.,
F. R. BARNES, *Sec'y & Gen'l M'g'r.*
STANDARD SANITARY MFG. CO.,
By FRANK J. TORRAND, *V. Pres't.*
WHEELING ENAMELED IRON CO.,
By J. E. WRIGHT, *Pres.*,
Per E. L. WAYMAN.
L. WOLFF MFG. CO.,
HERMAN M. HOELSCHER, *Sec'y.*
NATIONAL SANITARY CO.,
F. G. BORDEN, *Pres.*
A. WEISKITTEL & SON CO.,
ANTON WEISKITTEL.
THE McCRUM-HOWELL CO.,
HOWARD T. GATES, *Sec'y.*
THE HUMPHREYS MFG. CO.
A. I. LAING.
UNION SANITARY MFG. CO.,
By C. E. GATES.
CLYMER MFG. CO.,
W. A. GUTHRIE, *Pres.*

EXHIBIT 2.

Resolution.

Whereas, a proposition is pending for a license agreement and a resale price for the benefit of the jobbing trade, and

Whereas, long-term contracts are a menace to said proposition,

We, the undersigned, manufacturers of enameled ware, hereby agree to take no orders for delivery beyond May 31, 1910.

This agreement is not binding upon the signers unless all mem-

bers of the Enameled Ware Manufacturers' Association are parties thereto and append their signatures.

The within is agreed to.

UNION SANITARY MFG. CO.,
By C. E. GATES.
L. WOLFF MFG. COMPANY,
HERMAN M. HOELSCHER, *Sec'y.*
THE DAY WARD CO.,
By A. E. WARD, *V. P.*
THE UNITED STATES SANITARY MFG. CO.,
A. H. CLINE, JR., *Sec'y.*
THE CAHILL IRON WORKS,
By F. H. CALDWELL, *Pres.*
BLAIRSVILLE ENAMELED WARE CO.,
F. D. COOK, *Pres't.*
A. WEISKITTEL & SON CO.,
ANTONI WEISKITTEL.
THE McCRUM-HOWELL CO.,
HOWARD T. GATES, *Sec'y.*
THE BARNES MFG. CO.,
F. R. BARNES, *Sec'y & Gen'l M'g'r.*
THE HUMPHREYS MFG. CO.
A. J. LAING.
CLYMER MFG. CO.,
W. A. GUTHRIE, *Pres.*
NATIONAL SANITARY MFG. CO.,
F. G. BORDEN, *Pres.*
THE J. L. MOTT IRON WORKS,
E. HAMMANN.
STANDARD SANITARY MFG. CO.,
By FRANK J. TORRAND.
WHEELING ENAMELED IRON CO.,
By J. E. WRIGHT,
Per E. L. WAYMAN.
KERNER MFG. CO.,
J. A. FRAUENHEIM, *Pres't.*

EXHIBIT 3.

Memorandum of Agreement.

We hereby agree to execute with E. L. Wayman of the city of Pittsburg, as licensor, on or before April 15th, 1910, a license agreement for the manufacture of sanitary enameled ware under the following United States letters patent:

"Various patents covering pneumatic dredgers."
(To be enumerated in detail.)

and such additional patents as may come into his possession, upon the terms, conditions, etc., as hereinafter stated or provided for:

1. The license agreement to cover the following schedules of enameled ware.

Schedule 1. 5-year guaranteed baths.
Schedule 2. 2-year guaranteed baths.
Schedule 3. All other grades of baths.
Schedule 4. Small ware, lavatories, etc., and R. R. sinks.
Schedule 5. Flat rim sinks.
Schedule 6. Competitive lavatories 552 to 562 inclusive 565 and 535.

2. The amount of royalty to be as follows: $5 per day per furnace in operation with a rebate of 90 per cent beginning with the 1st month of the 2nd period and monthly thereafter, if the terms of the license have been complied with.

3. For each violation of the price regulations of the license agreement we agree to forfeit a sum equal to the amount of the shipment in question, and such other penalties as may be agreed on.

4. The selling prices to the jobbers to be established through the licensor by a price committee appointed by the various manufacturers.

5. The resale prices to the jobber, taking into consideration the rebate for observance of buying and selling regulations, shall be figured as follows:

High-grade goods, 25 per cent above jobbers' cost.
Competition goods, 16⅔ per cent above cost.

6. The rebates to jobbers shall be as follows:

10 per cent payable at end of period for strict observance of agreements, the details of the manner in which the rebates shall be made, to be determined.

7. The length of the rebate periods shall be 3 months beginning April 15, 1910, with the exception of the first period, which shall end July 1.

8. The license agreement and resale prices shall become effective April 15 and the agreement to be executed between the manufacturers and jobbers shall contain a clause to the effect that all material purchased or on hand previous to the above date shall be sold at the resale prices that may be established.

9. The details of contract forms between the manufacturers and the licensor shall be drawn up by the licensor and submitted for approval at the next special meeting to be held in New York City.

10. The licensor will also submit the same covering agreement between the manufacturers and jobbers.

11. The following "preferential discounts" from the selling prices established by the licensor will be allowed the various manufacturers on sales to jobbers only:

Schedule 1. 5-year guaranteed baths.
Schedule 2. 2-year guaranteed baths.
Schedule 3. All other grades of baths.
Schedule 4. Small ware—lavatories, etc., and R. R. sinks.
Schedule 5. Sinks, flat rim.
Schedule 6. Competitive lavatories—552-562 inclusive 565 and 535.

SCHEDULES.

Manufacturers.	1.	2.	3.	4.	5.	6.
	Per ct.	*Per ct.*	*Per ct.*	*Per ct.*	*Per ct.*	*Per ct.*
Standard	None.	None.	None.	None.	None.	None.
Wolff	None.	None.	None.	None.	None.	None.
U. S.	None.	None.	None.	None.	None.	None.
Kohler	None.	None.	None.	None.	None.	None.
Barnes	None.	None.	None.	None.	None.	None.
Cahill	None.	None.	None.	None.	None.	None.
Mott	None.	None.	None.	None.	None.	None.
Union	5	2½	None.	2½	None.	None.
Colwell	5	2½	None.	2½	None.	None.
Clymer	5	2½	None.	2½	None.	None.
Blairsville	5	2½	None.	2½	None.	None.
McVey & Walker	5	2½	None.	2½	None.	None.
Weiskittel	5	2½	None.	2½	None.	None.
National	5	2½	None.	2½	None.	None.
Iron City	5	2½	None.	2½	None.	None.
Humphreys	5	2½	None.	2½	None.	None.
Day-Ward	5½	2½	None.	2½	None.	None.
McCrum-Howell	5	2½	None.	2½	None.	None.
Wheeling	5	2½	None.	2½	None.	None.

12. The length of time for which the License Agreement will be entered into and such other details as may be necessary for the perfection of the arrangement to be determined at the next meeting of the various manufacturers.

(Signed) THE McCRUM-HOWELL CO.
LLOYD G. McCRUM, *Pres't.*
BLAIRSVILLE ENAMELED WARE CO.
A. W. CHIPMAN, *Treas.*
NATIONAL SANITARY MFG. CO.
F. G. BORDEN, *Pres.*
THE BARNES MFG. CO.
F. R. BARNES, *Sec'y and Gen'l M'g'r.*
THE HUMPHREYS MFG. CO.,
By REID CARPENTER, *Treas.*
UNION SANITARY MFG. CO.,
Per A. E. GATES,
2nd Vice-Pres'd't & Gen'l M'g'r.
WHEELING ENAMELED IRON CO.
J. E. WRIGHT, *Pres't.*
STANDARD SANITARY MFG. CO.,
By FRANCIS J. TORRENCE, *V. Pr's't.*
L. WOLFF MANUFACTURING CO.
HERMAN M. HOELSCHER, *Sec'y.*
UNITED STATES SANITARY MFG. CO.,
By A. H. CLINE, JR., *Sec'y.*
ANTON WEISKITTEL & SON CO.,
By ANTON WEISKITTEL.

EXHIBIT 4.

[*Copy of Letter Sent by Wayman to all Manufacturers of Sanitary Enameled Ironware.*]

Edwin L. Wayman, 1509 Arrott Building.

PITTSBURG, *April* 16, 1910.

The price and schedule committee created at the meeting held in New York City, for the purpose of concluding the license and resale agreements, have just completed a special session held at Mount Clemens, Mich., beginning April 8 and ending April 14.

All the details of the license agreement and jobbers' agreement were thoroughly gone into and considered, every paragraph being carefully weighed; the committee making such additions or eliminations as they considered advisable.

Some changes were made in the arrangement of the schedules as you will note by the attached copy as well as some changes in the differentials. All members who had suggestions to make or those whom the committee desired to see, appeared before them and after going into all details and bringing up every possible question they went away entirely satisfied after having presented the committee with letters, several of which are given below:

"We hereby accept your proposition as to a license agreement under dredger patents by which we are permitted to use said patents, and for the use of which we agree to pay you as per terms of said license agreement at the rate of $5 per day per furnace in operation, less such rebates that you may hereafter decide upon; it being understood that all licensees shall be upon the same uniform schedule of prices per furnace and the same uniform charge and rebate. We further agree to maintain any and all stipulations and provisions set forth in the schedules and also to the different differentials established for our company as shown in the attached sheet."

"After having met with the committee and gone into the matter very carefully, we have given it due consideration and in the matter of harmony we will waive all demands which we made in our previous letter as to schedule, and will agree to manufacture all ware which we make under one of the three dredger patents, and we will also agree to the schedule of differentials in prices as submitted by your committee, and trust that our action will enable you to harmonize other interests."

The committee will hold additional meetings Tuesday April 19 at Pittsburg, and Thursday, April 21, at New York City, which meetings are believed will finish all the preliminaries. You may, therefore, expect to receive a notice calling a general meeting to be held in New York City during the first week in May for the purpose of executing the final license agreement papers, which will put this and the resale proposition into effect on June 1, which date is being expected and insisted upon by the jobbers throughout the country. The papers you will be asked to sign at this meeting will

not be subject to any further changes. They embrace the best suggestions made to the committee, have been passed on by the best legal talent in the country and it will not be feasible to make any additional changes in order to meet the ideas of the attorneys of the individual companies. Will you therefore, come prepared to sign or bring such principals with you that have authority to conclude the matter?

Yours very truly,

E. L. WAYMAN.

The following "preferential discounts" from the selling prices established by the licensor will be allowed the various manufacturers on sales to jobbers only.

Schedule 1. 5-year guaranteed baths.
Schedule 2. 2-year guaranteed baths.
Schedule 3. All other grades of baths.
Schedule 4. Small ware, lavatories, etc.
Schedule 4½. R. R. sinks, slop sinks, sink backs, drain boards, factory sinks, urinals, hoppers, laundry.
Schedule 5. Sinks, flat rim.
Schedule 6. Competitive lavatories, 558, 559, 561, 562.
Schedule 7. Closet tanks, high and low.

SCHEDULES.

Manufacturers.	1.	2.	3.	4.	4½.	5.	6.	7.
	Per ct.	*Per ct.*	*Per ct.*	*Per ct.*	*Per ct.*	*Per ct.*	*Per ct.*	*Per ct.*
Standard	None.	None.	None.	None.	None.	None.	None.	None.
Wolff	None.	None.	None.	None.	None.	None.	None	None.
U. S	None.	None.	None.	None.	None.	None.	None.	None.
Kohler	None.	None.	None.	None.	None.	None.	None.	None.
Barnes	None.	None.	None.	None.	None.	None.	None.	None.
Cahill	None.	None.	None.	None.	None.	None.	None.	None.
Mott	None.	None.	None.	None.	None.	None.	None	None.
Union	5	None.	None.	2½	2½	None.	None.	None.
Colwell	5	2½	None.	2½	2½	None.	None.	None.
Clymer	5	2½	None.	5	5	2½	2½	2½
Blairsville	5	2½	None.	5	5	2½	2½	2½
McVey & Walker	5	2½	None.	5	5	2½	2½	2½
Kerner	5	2½	None.	5	5	None.	2½	None.
Weiskittel	5	2½	None.	2½	2½	None.	None	None.
National	5	2½	None.	2½	2½	None.	None.	None.
Humphryes	5	2½	None.	2½	2½	None.	None.	None.
Day-Ward	5	None.	None.	2½	2½	None.	None.	None.
McCrum-Howell	5	2½	None.	2–5	2½	None.	None.	None.
Wheeling	5	2½	None.	2½	2½	None.	None.	None.

The above "preferential discounts" shall not apply on sales to the plumber when made either by the jobbers or direct by the manufacturers.

All makes of goods shall be sold to the plumber at the resale prices that may be established in the sheets.

EXHIBIT 5.

Agreement.

This agreement made this 4th day of May, 1910, by and between Edwin L. Wayman, of Pittsburg, Allegheny County, Pennsylvania, party of the first part, and the Standard Sanitary Manufacturing Company, a corporation organized and existing under the laws of the State of New Jersey, having a place of business at Pittsburg, in said county and State, party of the second part,

Witnesseth: That whereas the party of the second part is the owner of the entire right, title and interest in and to patent No. 633,941 to James Arrott, dated September 26, 1899, for dredger for pulverulent material;

And whereas the party of the first part desires to secure the exclusive right, title and interest in and to said letters patent and invention;

Now, therefore, be it known that the parties have agreed as follows:

First. The party of the second part hereby agrees that it will assign, sell and set over unto the party of the first part, its entire right, title and interest in and to said letters patent and invention, for and in consideration of a cash payment by the party of the first part, to be hereafter agreed upon, and for and in consideration of the following covenant on the part of the party of the first part.

Second. The party of the first part, for and in consideration of the said assignment, agrees that the party of the second part shall, at the expiration of two years from the date hereof, have the right to request, if it shall so desire, a reassignment to it of the said patent; and further agrees if at any time after the expiration of the said period, the party of the second part shall request such reassignment, that he will at once, and without further consideration, execute and deliver any and all papers necessary to effect such reassignment.

In witness whereof, the party of the first part has affixed his hand and seal the day and year first above written, and the party of the second part has caused these presents to be executed by its vice-president and attested by its secretary.

[SEAL.] EDWIN L. WAYMAN.

STANDARD SANITARY MFG. CO.,

By FRANCIS J. TORRANCE,

Vice-President.

Attest:

W. A. MYLER, *Secretary.*

EXHIBIT 6.

2–392.

DEPARTMENT OF THE INTERIOR,
UNITED STATES PATENT OFFICE.

Received and recorded on the 2d day of June, 1910, in Liber X, 84, page 61 of Transfers of Patents.

In testimony whereof, I have caused the seal of the Patent Office to be hereunto affixed.

(Patent Office—United States of America.)

E. B. MOORE,
Commissioner of Patents.

Exd.
E. H. G.

6—1697.

Assignment.

Whereas, the Standard Sanitary Manufacturing Company, a corporation organized and existing under the laws of the State of New Jersey, and having a place of business at Pittsburgh, Pa., is the owner of all the right, title and interest in and to the following letters patent, viz:

Pat. No. 633,941; date, Sept. 26th, 1899; inventor, James Arrott; title, dredger for pulverulent material.

And whereas, Edwin L. Wayman, a resident of Pittsburg, in said county and State, desires to acquire all right, title and interest in and to said patent, and in and to the invention covered, or intended to be covered, thereby;

Now, therefore, be it known, that for and in consideration of the sum of ten thousand dollars ($10,000) by the said Edwin L. Wayman in hand paid, the receipt of which is hereby acknowledged, the Standard Sanitary Mfg. Co. aforesaid has assigned, sold, and transferred, and by these presents does assign, sell and transfer, unto the said Edwin L. Wayman, the entire right, title and interest in and to said letters patent and invention, the same to be held and enjoyed by the said Edwin L. Wayman, his heirs, executors, administrators and assigns, as fully and completely as the same would have been held and enjoyed by the said Standard Sanitary Mfg. Co. had this sale and assignment not been made.

In witness whereof, the Standard Sanitary Mfg. Co. has caused these presents to be signed by its vice-president and attested by its secretary, this fourth day of May, 1910.

STANDARD SANITARY MFG. CO.,
By FRANCIS J. TORRANCE,
Vice-President.

Attest:
W. A. MYLER, *Secretary.*

EXHIBIT 7.

United States Patent Office.

James W. Arrott, Jr., of Allegheny, Pennsylvania—Dredger for Pulverulent Material.

Specification forming part of Letters Patent No. 633,941, dated September 26, 1899—Application filed March 21, 1899—Serial No. 709,945. (No model.)

To all whom it may concern:

Be it known that I, James W. Arrott, Jr., a citizen of the United States, residing at Allegheny, in the county of Allegheny and State of Pennsylvania, have invented certain new and useful Improvements in Dredgers for Pulverulent Material; and I do hereby declare the following to be a full, clear, and exact description of the invention, such as will enable others skilled in the art to which it appertains to make and use the same.

This invention has relation to articles used for sifting and distributing powdered enameling material on the surface of bathtubs and other vessels, commonly known to the trade as "dredgers."

The ordinary dredger consists simply of a sieve or other screen of proper mesh having a handle of convenient length by which it is held and manipulated. As the pulverulent material does not freely pass through the sieve or evenly distribute itself spontaneously, it is necessary in dredging to continually agitate the dredger with the hand or with some instrument held in the hand by tapping or striking the dredger or by striking the dredger against the edge of the article to be enameled. This renders the labor of dredging or sifting very tiresome and slow and requires considerable skill in manipulating the dredger so as to insure an even delivery of the enameling material.

The object of this invention is to provide an automatic tapper or agitator which will deliver a succession of rapid blows against the side or end of the dredger and while relieving the workman of a great deal of labor causes the pulverulent material or powder to be evenly distributed and to be uniformly discharged. The device which I employ for this purpose is preferably a pneumatic hammer, the piston or plunger of which is elongated and fitted to the hollow handle of the dredger, so as to reciprocate within the latter and strike the end or side of the dredger with every forward stroke.

In the accompanying drawings, Figure 1 is a longitudinal sectional view of a dredger constructed according to my invention, and Fig. 2 is a top view of the same.

A designates the sieve or sifter, consisting of a box-like receptacle or trough having a wire-cloth screen at the bottom, through which the enameling material is shaken.

B designates a tubular handle consisting of a section of pipe attached to the end of the sifter.

C designates the body or casing of the pneumatic hammer, coupled to the end of the handle and of any suitable construction.

The piston *a* is either extended through the handle or is connected to a rod *d*, which operates in unison with the piston and which may be formed with enlargements at the ends to fit the bore of the handle and the end of the casing. The end of the handle next to the dredger is plugged to receive the stroke of the rod or piston. The air-tube F, leading from a compressed-air reservoir G, which is preferably flexible, is coupled to the outer end of the casing, and a suitable valve E is provided within easy reach of the workman to control the admission of air and regulate the force of the blow.

By the use of this device the operator is enabled to distribute and deposit the enamel more quickly and evenly and has the use of both hands to carry and manipulate the dredger, relieving him of a great deal of hard work and enabling him to turn out more work in a given time than is possible by the use of the present style of dredger.

I am aware that jarring or vibrating devices have been used in stationary apparatus used for sifting materials, and I disclaim any application of my invention to such purposes; but in the operation of the application of enamel in the powdered form the dredger or sifter has always been carried by the operator in one hand, while the necessary jar to produce sifting was communicated either to the handle of the sifter or to the sifter itself by some instrument in the other hand, or in some instances the sifter is held in both hands by one operator, while an assistant produced the necessary jar to cause sifting, and it is to this class of apparatus and operations that my invention relates and applies.

The pneumatic hammer forming part of the agitator is of the ordinary and well-known construction in which the piston has a rapid reciprocating motion automatically produced by the action of compressed air.

Having thus described my invention, what I claim as new is—

1. A dredger or sifter consisting of a screen or sieve and a supporting-handle, in combination with a pneumatic agitator attached to the dredger and adapted to vibrate the sieve substantially as described.

2. A dredger or sifter consisting of a sieve and a handle in combination with an automatic agitator secured to and carried by the dredger and adapted to agitate or vibrate the same, substantially as described.

3. A dredger or sifter comprising a sieve and handle and an automatic agitator secured thereto with means for controlling the operation of said agitator, substantially as described.

In testimony whereof I affix my signature in presence of two witnesses.

JAMES W. ARROTT, JR.

Witnesses:
GEO. W. CRAIG.
E. F. GREGG.

Form No. 100. 5-3-10.

EXHIBIT 8.

License Agreement.

This agreement, made in duplicate this — day of ——, 191–, between Edwin L. Wayman, a resident of the city of Pittsburg, State of Pennsylvania (hereinafter called the "Licensor"), party of the first part, and —— ——, a corporation duly organized and existing under and by virtue of the laws of the State of — (hereinafter called the "Licensee"), party of the second part.

Witnesseth:

That whereas, the said Wayman owns or controls or has the right to grant licenses under certain letters patent pertaining to the manufacture of sanitary enameled iron ware, enumerated in "Schedule of Patents," hereto annexed, and

Whereas the Licensee is desirous of acquiring a license under said letters patent of the character and upon the terms and conditions herein set forth;

Now, therefore, for and in consideration of the covenants of this agreement, the parties hereto agree as follows:

1. The Licensor hereby grants to the Licensee, subject to the provisions hereinafter contained, a nonexclusive license to practice in the manufacture of sanitary enameled iron ware, the processes patented in said several patents, to make and use in such manufacture the machines and devices patented in said patents and to use and sell goods so made; the said license being nonassignable and nontransferable except to successors to substantially the entire good will and business of the Licensee, and this license shall be available for the Licensee and its successors only so long as it or they have not, prior to the date hereof, been engaged in the manufacture of sanitary enameled iron ware.

Claims.

2. The Licensor hereby agrees to suspend his claims against the Licensee and its customers or patrons for damages or profits which he may be entitled to receive for any claims for any past infringement of said letters patent by said Licensee, as long as said Licensee continues to perform all of its obligations under this contract.

3. So long as the Licensee operates under this license or any renewal thereof and keeps and performs all of the obligations of said license herein contained, the Licensor agrees not to bring action against said Licensee because of its use of any machines, method or processes now or heretofore used by said Licensee in the manufacture of enameled ware, and to waive any and all claims under any letters patent on any machines, devices, or processes now in use by said Licensee, and to grant to said Licensee full use and enjoyment thereof.

Royalties.

4. For the use of the various patents enumerated in "Schedule of Patents," hereto annexed, the Licensee shall pay on the fifth day of each month a royalty amounting to five ($5.00) dollars per day for each furnace in operation during the preceding month.

This payment shall be made to the Licensor at his place of business in Pittsburgh, Pa., by cash or other acceptable remittance, and in determining the amount of this royalty each and every one of the furnaces owned by the Licensee shall be considered as in operation each day, unless the said furnace or furnaces shall be shut down for more than a period of six (6) consecutive working days. In case any of the furnaces are thus shut down for more than six (6) consecutive working days, the Licensee shall be entitled to a diminuation of his license payment at the rate of five ($5.00) dollars per working day for the number of days shut down.

In order to determine the amount of actual license payment, together with the remittance hereinbefore provided for payment of royalty, the Licensee shall send to the Licensor a sworn statement, which will be duly verified under oath by some representative of the Licensee, designated by the Licensor showing the number of furnaces owned by the Licensee at the beginning of the month which the report is intended to cover and the number of days which such furnaces have been operating consistent with the provisions of the foregoing section of this license.

Preferential Discounts.

5. This agreement is entered into with the understanding that the Licensee has the privilege of quoting to jobbers only the following additional discounts from the regular selling prices to the jobbers as established by the Licensor. These additional discounts when given, shall appear on the invoices rendered to the jobber.

	Discounts.
Schedule No. 1. 5-year guaranteed baths and receptors...	.....
Schedule No. 2. 2-year guaranteed baths.....	.....
Schedule No. 3. All other grades of baths.....	.....
Schedule No. 4. Small wares, lavatories, etc.....	.....
Exceptions: Lavatories, similar to Plate Nos. (Standard) P-558, 559, 561 and 562.....	.....
Schedule No. 4½. Roll rim sinks, slop sinks, sink backs and ends, drain boards, factory and wash sinks, urinals and urinal ranges, closet bowls and closet ranges, hoppers, hopper and trap combinations, hopper trays, and laundry trays	.....
Schedule No. 5. Sinks, flat rim, square and round-cornered, kitchen, half-circle and flat rim sink combinations	.....
kitchen, half-circle and flat rim sink combinations....	.....
Schedule No. 6. Closet tanks, high and low pattern.....	.....

Prices.

6. The Licensor agrees that he will employ a commission of six (6) persons, of which he is to be one and to act as chairman thereof, five of whom shall be designated by a majority of the parties holding licenses similar to this license, which commissions shall have supervision of all the relations and transactions between the parties hereto under this agreement, but it is understood that where a member of said commission, or his company, shall be directly interested in any question of a violation of the license to be decided by the said commission, said member shall be disqualified and a temporary member shall be appointed in his place by the remaining members of the commission.

All terms and conditions relative to prices and discounts now established by the Licensor and set forth in the annexed schedules and made a part hereof, shall remain in force and effect until other terms, conditions and preferential discounts are substituted therefor by the Licensor, which substitution can only be made by him with the approval of a majority of the members of the commission, hereinbefore prescribed. Notice of such changes and substitutions shall be given from time to time in writing by the Licensor to the Licensees. The Licensee covenants to adhere to and maintain such terms, conditions, regulations, prices and preferential discounts as may be established by the Licensor from time to time, and the Licensee further agrees to sell no "seconds" or "Bs" covered by Schedules 4, 4½, 5 and 6.

Royalty Rebates.

7. If at the end of the fourth month of the first year (said year beginning June 1, 1910), it shall appear that the Licensee has during the first month complied with all the terms of this agreement, the Licensor shall return the Licensee the following rebate from the royalties paid for said license for said first month's royalties, to wit: 80 per cent of the amount originally paid by the Licensee.

8. At the termination of each succeeding month of the said license, if it shall appear that the Licensee has fully complied with the terms of this agreement during the second preceding month, the Licensor shall make a similar rebate in respect to the royalties paid by the Licensee during the second preceding month.

9. In case of failure on the part of the Licensee to comply in any particular with the terms of this agreement during any month, the Licensor may withhold any and all unpaid rebates and declare the same forfeited as penalty for such violation and shall at once notify the Licensee to that effect.

Export.

10. The restrictions herein contained as to the prices at which sanitary enameled iron ware is to be sold shall not apply to sanitary

enameled iron ware sold and exported to foreign countries. Such sales must be proved bona fide to the Licensor.

11. The books of the Licensee shall be open to inspection, at all reasonable times, by the Licensor, by an accountant appointed by the Licensor, not associated in any manner with any of the Licensees or jobbers.

Validity of Patents.

12. The Licensee admits the validity of said several patents enumerated herein, for the purpose of this agreement and license only, and it is further agreed that upon the termination of this agreement and license for any cause, the Licensee shall not be estopped to deny the validity of the said patents or any of them. The Licensor agrees that he will, upon the written request of at least three-quarters in number of the Licensees at any time holding licenses similar to this license, use all legal and equitable means to protect the Licensee in the full use and enjoyment of the rights under this agreement and license from all non-licensed parties using any of said machines, processes or devices, or from any sales infringing said patents by customers or any such parties, either by suits or by bringing them under a similar license. If, however, the Licensor refuses to take such action against such non-licensed parties, other customers, or users of such non-licensed goods, for ninety days after being requested so to do, as before provided, this license shall be voidable at the election of the Licensee communicated in writing to the Licensor, and the Licensee thereafter shall be released from all obligations hereunder, and shall not hereafter be estopped to deny the validity of said patents or any of them.

Labels.

13. No goods manufactured under this license shall be sold unless they bear a registered label (except where otherwise specified), owned by the Licensee and in addition thereto a license tag or label approved by the Licensor, which license tag or label shall be placed in a visible position on all goods made hereunder and sold by the Licensee.

14. This agreement is binding upon the parties hereto, and the successor and assigns of each of them, and shall continue in force for a period of two years from the date hereof unless previously terminated as herein provided.

15. This agreement, however, may be canceled by the Licensor by written notice upon repeated breaches by the Licensee of any of the covenants herein contained.

In witness whereof, the parties hereto have executed these presents the day and year above written.

SCHEDULE OF PATENTS.

Patent No.	Date.	Inventor.	Title.
633941	Sept. 26, 1899	James Arrott.....	Dredger for pulverulent material.
949625	Feb. 15, 1910	E. Ditheridge.....	Pneumatic sieve.
939918	Nov. 9, 1909	William Lindsay....	Enameling powder distributor.

EXHIBIT 9.

[NOTE.—This contract must be executed by the purchaser in order to purchase licensed sanitary enameled iron ware.]

Jobber's License Agreement.

This agreement, made this — day of ——, 19—, between the —— ——, a corporation (hereinafter called the Company), and —— —— State of —— (hereinafter called the purchaser).

Witnesseth: Whereas the company is licensed under certain United States Letters Patent relating to sanitary enameled ware and processes and apparatus used in the manufacture thereof, which said letters patent are enumerated as follows:

SCHEDULE OF PATENTS.

Patent No.	Date.	Inventor.	Title.
633941	Sept. 26, 1899	James Arrott.....	Dredger for pulverulent material.
949625	Feb. 15, 1910	E. Ditheridge.....	Pneumatic sieve.
939918	Nov. 9, 1909	William Lindsay....	Enameling powder distributor.

And whereas, the purchaser desires to purchase from the company sanitary enameled ironware embodying or made in accordance with said inventions, and to obtain licenses to sell such ware to others, and the company is willing to sell sanitary enameled ironware to the purchaser, and to license it for resale on the following terms and conditions:

Now, therefore,

1. The company agrees to sell and the purchaser agrees to buy for a period of time beginning June 1, 1910, and ending December 31, 1910, —— sanitary enameled ironware at the following discounts (Insert label.) from the prices given in the various schedules:

Discounts and Terms.

Articles.

[Discounts from resale prices established by the licenser. (To be allowed on invoices by the manufacturer.)]

	Per cent.
Schedule No. 1 Five-year guaranteed baths, foot, pool, sitz and child's, and receptors	7½
Schedule No. 2. Two-year guaranteed baths	5
Schedule No. 3. All other grades of baths	5
Schedule No. 4. Small wares, drinking fountains, lavatories, etc.	7½
Exceptions: Lavatories, similar to plates (standard) P-558, 559, 561 and 562	5
Schedule No. 4½. Roll-rim sinks and combinations, slop sinks, sink backs and ends, drain boards, factory and wash sinks, sink and tray combinations, laundry trays, closet bowls and urinals	5
Schedule No. 5. Flat-rim sinks and combinations, square and round corner kitchen, half circle, corner, slop sinks, slop hoppers, wash-bowls, trap standards, and grease traps	5
Schedule No. 6. Tanks, closet and urinal, high and low pattern.	5

Terms: Net 60 days or 2 per cent for cash 10th of month following shipment.

Deliveries.

2. Goods will be sold to the purchaser, f. o. b. cars where factory is located, at the prices given in the resale sheets for the various zones (subject to the discounts and rebates named) with full freight allowed on shipments of 200 pounds and over (subject to the freight tariff regulations herein provided for) to the list of cities named in the various zones. To other points than those named, delivery can be made only on the basis of the purchaser being charged and paying freight from the nearest city named, based on the weights shown in the sheets and at the rates shown in the equalizing tariff schedule.

NOTE.—Goods may be shipped in mixed carloads to all points on, or east of the western bank of the Mississippi River, Minneapolis to New Orleans and to the Atlantic seaboard, inclusive. To points west of the western bank of the Mississippi River, goods may only be shipped in mixed carloads to points so provided for in the railroad tariffs and classifications.

Goods shall be resold by the purchaser at prices established and prevailing in the various zones into which the goods are shipped, regardless of the point of purchase.

Purchaser will be allowed carload prices in any quantity on shipments to the manufacturing and jobbing points specified. On ship-

ments to jobbing points, other than manufacturing points, carload or less carload prices will apply according to quantity.

General Conditions.

3. Prices or other regulations are effective the morning of the date appearing on the sheet.

4. The ware covered by the price sheets shall be invoiced by individual items, and it is not permissible to bill collectively several articles in a "Lump sum."

5. The various conditions respecting "Guarantees" under which the ware is purchased by the jobber, shall not be varied in the resale to the plumber.

6. The restrictions herein contained as to the prices at which sanitary enameled iron ware is to be purchased and sold, shall not apply to sanitary enameled iron ware sold and exported to foreign countries. Such sales must be proved bona fide to the licensor.

Rebates.

7. If all the conditions of this agreement have been complied with and you have confined your purchases to the licensed manufacturers, we will pay you rebates on such purchases as you have made from us as follows:

	Per cent.
Schedule No. 1. 5-year guaranteed baths, foot, pool, sitz, and child's and receptors	5
Schedule No. 2. 2-year guaranteed baths	5
Schedule No. 3. All other grades of baths	5
Schedule No. 4. Small wares, drinking fountains, lavatories, etc.	5
Exceptions: Lavatories, similar to plates (standard) P-558, 559, 561, and 562	5
Schedule No. 4½. Roll rim sinks and combinations, slop sinks, sink backs and ends, drain boards, factory and wash sinks, sink and tray combinations, laundry trays, closet bowls, and urinals.	5
Schedule No. 5. Flat-rim sinks and combinations, square and round cornered, kitchen, half circle, corner, slop sinks, slop hoppers, wash-bowls, trap standards, and grease traps	5
Schedule No. 6. Tanks, closet and urinal, high and low pattern	5

8. If your purchases of material, less returned goods, covered by the various schedules from the following manufacturers licensed under the patents enumerated hereinbefore:

Barnes Manufacturing Co., The	Mansfield, Ohio.
Cahill Iron Works, The	Chattanooga, Tenn.
Colwell Lead Co	New York.
Day-Ward Co., The	Warren, Ohio.
Humphreys Mfg. Co., The	Mansfield, Ohio.
Kerner Manufacturing Co	Pittsburg, Pa.

Mott Iron Works, The J. L.	New York City.
McVay & Walker	Braddock, Pa.
McCrum-Howell Co., The	New York City.
National Sanitary Mfg. Co., The	Salem, Ohio.
Standard Sanitary Mfg. Co	Pittsburg, Pa.
Union Sanitary Mfg. Co	Noblesville, Ind.
United States Sanitary Mfg. Co	Pittsburg, Pa.
Wolff Mfg. Co., L	Chicago, Ill.
Weiskittel & Son Co., A	Baltimore, Md.
Wheeling Enameled Iron Co	Wheeling, W. Va.

have aggregated sums as follows and if all the conditions of this agreement have been complied with the company will pay the purchaser rebates on such purchases as they have made from the company during the period ending December 31, 1910, as follows:

	Per cent.
$10,000	2½
$15,000	3
$20,000	3½
$25,000	4
$30,000	5

Rebates are payable only at the expiration of the period ending December 31, 1910, and after claims have been approved by E. L. Wayman, licensor, Arrott Building, Pittsburg, Pa.

Written application for rebate must be made at the close of the rebate period to E. L. Wayman, licensor, upon standard forms, which may be obtained from him for that purpose. Unless claim for rebate is presented within thirty days after the expiration of this agreement, the right to refuse to allow such rebate is reserved by the licensor named above.

If at the expiration of this contract, a similar contract is made between the parties hereto and the purchases under each contract are sufficiently large so that the aggregate of the purchases under both contracts are double the amounts named above, then the company will pay the percentage rebate named above on the entire amount of such purchases under both contracts, but it shall not be permissible to aggregate purchases made under more than two successive contracts to obtain any greater rebate than may be payable under the last of such two successive contracts.

9. The purchaser understands that the resale prices of all ware manufactured under the letters patent enumerated herein, as established from time to time by the company, must be maintained by all licensed sanitary enameled-iron ware manufacturers and by all jobbers and dealers and that sales by one jobber to another can not be made at any better prices than established in the sheets. The purchaser therefore agrees that he will observe and strictly maintain on all types and classes of ware the selling prices as they are set forth in the schedules, and will observe and strictly adhere to the rules and regulations as embodied in the price sheets and furnished as a part of this agreement, or as they may be embodied

in the price sheets issued hereafter and substituted by or under the authority of the licensor (E. L. Wayman) in place of those furnished herewith. Articles may be added to or removed from the scedules at any time; but in the event of such removal, the purchases to date of such removal will be considered as part of the amount on which rebate is estimated.

10. The purchaser also agrees during the life of this contract not to purchase, sell, advertise, solicit orders for, or in any way handle or deal in sanitary enameled ironware of any manufacturer not licensed under the letters patent enumerated herein, except with the express written permission of the licensor. Breach of any of the provisions of this agreement, or any failure to maintain and observe prices, rules or regulations shall give the Company, or E. L. Wayman, owner of the patents hereinbefore enumerated, an option immediately to cancel this contract, all unfilled orders and to withhold all rebates; and the purchaser is hereby expressly put on notice that in case of any such failure he can not thereafter obtain sanitary enameled ironware manufactured under the letters patent above enumerated from any of the licensed manufacturers.

11. As an added consideration for this agreement whereby the purchaser is to be sold goods manufactured under the patents hereinbefore named, the purchaser hereby agrees that as to all goods, wares and merchandise, which are manufactured under and in accordance with the patents hereinbefore named, the purchaser will only resell such goods now on hand, or already purchased by him, irrespective of by whom such goods have been manufactured, in accordance with the rules, terms, conditions, prices and regulations of sale which are herein established, or which may hereafter be established in accordance with the terms of this agreement, as specially set forth in paragraph 9 hereof.

12. This agreement does not become binding on the Company until accepted in writing at the foot hereof by the sales manager or his duly authorized representative located in the main sales office of the Company.

—— ——.

Accepted this — day of ——, 19—.

—— —— (Purchaser.)

—— —— (Company.)

By —— ——.

[This statement must be signed by both manufacturer and jobber, detached and filed promptly with E. L. Wayman, Arrott Building, Pittsburg, Pa.]

Dated —— —, 191–.

E. L. Wayman, Licensor, Arrott Building, Pittsburg, Pa.:

This is to certify that a "Jobber's license agreement" purchase contract has been executed between —— —— (manufacturer) and —— —— (jobber), (city and State) ——, at the following discounts (subject to the established rebates) from the resale prices established

by you or that may be established by you during the period ending December 31, 1910.

	Discounts.
Schedule No. 1. 5-year guaranteed baths, foot, pool, sitz and child's, and receptors	.....
Schedule No. 2. 2-year guaranteed baths	.....
Schedule No. 3. All other grades of baths	.....
Schedule No. 4. Small wares, drinking fountains, lavatories, etc	.....
Exceptions: Lavatories, similar to plates (standard) P-558, 559, 561, and 562	.....
Schedule No. 4½. Roll-rim sinks and combinations, slop sinks, sink backs and ends, drain boards, factory and wash sinks, sink and tray combinations, laundry trays, closet bowls and urinals	.....
Schedule No. 5. Flat-rim sinks and combinations, square and round corner kitchen, half circle, corner, slop sinks, slop hoppers, washbowls, trap standards and grease traps	.....
Schedule No. 6. Tanks, closet and urinal, high and low pattern	.....

(Signed) —— —— (*Manufacturer*),
By —— ——.
—— —— (*Jobber*),
By —— ——.

EXHIBIT 10.

Price List.

[Price list Edwin L. Wayman, 633,941, 949,625, 939,918, Pittsburg. "Licensed." Sanitary enameled iron ware, June 1, 1910.]

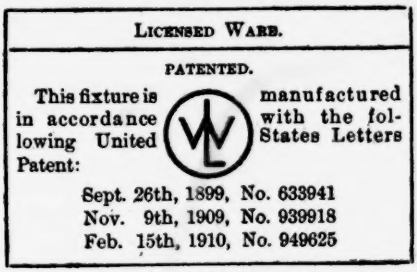
[Licensed.]

Sanitary Enameled Iron Ware.

The patented automatic enameling processes adopted by the licensed companies covers substantially all the ways in which sanitary enameled iron ware may be enameled economically and with durability and are essential to the production of ware of the highest quality.

That the ware made in accordance with these patented processes may be easily identified, each fixture after June 1, 1910, will bear the following label:

[Licensed label.]


LICENSED WARE.
PATENTED.
This fixture is manufactured in accordance with the following United States Letters Patent:
Sept. 26th, 1899, No. 633941
Nov. 9th, 1909, No. 939918
Feb. 15th, 1910, No. 949625

(Enlarged reproduction.)

and its presence evidences that the best materials and processes have been employed in its manufacture.

Licensed sanitary enameled iron ware embodies all that is significant of quality and progress.

JUNE 1, 1910.

To licensed jobbers' salesmen:

This price list is the property of E. L. Wayman, Arrott Building, Pittsburg, and is loaned to you with the understanding that it is subject to recall at any time. The prices given herein are the selling prices I have established to plumbers on sanitary enameled iron-ware manufactured by the following companies, operating under patents owned by me and to whom I have granted licenses:

Barnes Manufacturing Co., The	Mansfield, Ohio.
Cahill Iron Works, The	Chattanooga, Tenn.
Colwell Lead Company	New York.
Day-Ward Co., The	Warren, Ohio.
Humphreys Manufacturing Co	Mansfield, Ohio.
Kerner Manufacturing Co	Pittsburg, Pa.
Mott Iron Works, The J. L	New York.
McCrum-Howell Co	New York.
McVay & Walker	Braddock, Pa.
National Sanitary Manufacturing Co	Salem, Ohio.
Standard Sanitary Manufacturing Co	Pittsburg, Pa.
Union Sanitary Manufacturing Co	Noblesville, Ind.
United States Sanitary Manufacturing Co	Pittsburg, Pa.
Wolff Manufacturing Co., L	Chicago, Ill.
Weiskittel & Son Co., A	Baltimore, Md.
Wheeling Enameled Iron Co	Wheeling, W. Va.

It is necessary for all licensed manufacturers to sell their product manufactured in accordance with these patents on the terms herein established and you are hereby notified that the license agreements executed by your company obligates it to resell the various licensed products at no better prices, terms, or other regulations than herein

established. As changes, additions, or eliminations occur, new sheets will be issued promptly.

E. L. WAYMAN.

Arrott Building, Pittsburg, Pa.

Classification.

Classification of Sanitary Enameled Ironware Products.

Schedule No. 1. 5-year guaranteed baths, foot, pool, sitz, and child's, and receptors.....
Schedule No. 2. 2-year guaranteed baths.....
Schedule No. 3. All other grades of baths.....
Schedule No. 4. Small wares, drinking fountains, lavatories, etc. Exceptions: Lavatories, similar to plates (standard) P-558, 559, 561, and 562.....
Schedule No. 4½. Roll rim sinks and combinations, slop sinks, sink backs and ends, drain boards, factory and wash sinks, sink and tray combinations, laundry trays, closet bowls and urinals.....
Schedule No. 5. Flat rim sinks and combinations, square and round corner kitchen, half circle, corner, slop sinks, slop hoppers, washbowls, trap standard, and grease traps.....
Schedule No. 6. Tanks, closet and urinal, high and low pattern .....

General Conditions.

Prices.—Prices or other regulations are effective the morning of the date appearing on the sheet.

All prices are for bare fixtures without fittings, except where specified.

Carload prices shall apply to shipments of enameled ware in carload lots in one delivery only, to one purchaser and paid for by one purchaser.

Lump sums.—The ware covered by the price sheets shall be invoiced by individual items, fixtures to be billed separately (less all fittings), and it is not permissible to bill collectively several articles in a "Lump sum."

Guarantees.—The various conditions respecting "Guarantees" under which the ware is purchased by the jobber shall not be varied in the resale to the plumber.

Deliveries.

Deliveries.—Goods will be sold to the purchaser f. o. b. cars where factory is located, at the prices given in the resale sheets for the various zones with full freight allowed on shipments of 200 pounds and over (subject to the freight tariff regulations herein provided for) to the list of cities named in the various zones. To other points than those named, delivery can be made only on the basis of the

purchaser being charged and paying freight from the nearest city named.

NOTE.—Goods may be shipped in mixed carloads to all points on or east of the western bank of the Mississippi River, Minneapolis to New Orleans and to the Atlantic seaboard, inclusive. To points west of the western bank of the Mississippi River, goods may only be shipped in mixed carloads to points so provided for in the railroad tariffs and classifications.

Goods shall be sold at prices established and prevailing in the various zones into which the goods are shipped, regardless of the point of purchase.

Purchaser (jobbers only) will be allowed carload prices in any quantity on shipments to the manufacturing and jobbing points specified. On shipments to jobbing points other than manufacturing points, carload or less carload prices will apply according to quantity.

[From jobber's stocks—Zones 1, 2, 3, 4, and 5.]

All shipments from jobber's stocks to other than jobbing points in zones 1, 2, 3, 4 and 5 shall be billed f. o. b. cars point of shipment.

If jobbers find it necessary on shipments from stock to nonjobbing points to equalize with other jobbing points, such equalizations shall be made on the basis of the weights given in the sheets and at the rates given in the equalizing freight tariff schedule.

[From jobbers' stocks—Zones 6, 7, 8, 9, 10 and 11.]

All shipments from jobbers' stocks to other than jobbing points in zones 6, 7, 8, 9, 10 and 11 shall be billed f. o. b. cars point of shipment with actual freight allowed to nonjobbing points.

[Direct shipments from factory—All zones.]

Shipments to other than jobbing points made direct from the factory on jobbers' orders, or sales made direct to plumbers by the manufacturers, shall be billed at the prevailing zone prices plus freight charges from the nearest jobbing point, based on the weights given in the sheets and at the rates given in the freight-equalizing tariff schedule.

[Freight zone (general)—Manufacturing and jobbing points.]

Car Load Zone 1 prices will be allowed purchaser (jobber only) and actual freight allowed on C. L. and L. C. L. shipments of 200 pounds and over to the following manufacturing and jobbing points:

Allegheny, Pa.
Baltimore, Md.
Chicago, Ill.
Cincinnati, Ohio.
Louisville, Ky.
Milwaukee, Wis.
Pittsburg, Pa.
Wheeling, W. Va.

The same conditions at zone 2 prices will apply on shipments to Chattanooga, Tenn.

Goods must be sold to the plumber at the quantity prices established in the Sheets.

(Here follows the body of the price list consisting of 276 printed pages.)

EXHIBIT 11.

(Letter Sent to the Jobbing Trade by Wayman.)

Edwin L. Wayman.

ARROTT BUILDING, PITTSBURG, *June* 3, 1910.

To the jobbing trade:

The sanitary enameled ironware industry has in the past been handicapped by the production and the marketing of quantities of "seconds," or defective goods, due to improper designs, manufacturing methods and equipment. Such goods have not been disposed of by the manufacturers as other than "seconds," but some unscrupulous purchasers have in a great many instances disposed of them by misrepresentation thereby causing the public who buy such goods to condemn sanitary enameled ironware to the detriment of the industry as a whole.

The basic object of the licensed manufacturers in adopting uniform methods of manufacture is to eliminate as far as possible the production and disposal of "seconds," thereby improving the general quality of their ware.

The patented automatic enameling processes adopted by the licensed companies cover substantially all the ways in which sanitary enameled iron ware may be enameled economically and with durability and are essential to the production of ware of the highest quality.

That the ware, made in accordance with these patented processes, may be easily identified, each fixture manufactured after June 1, 1910, will bear the following label:

LICENSED WARE.
PATENTED.
This fixture is manufactured in accordance with the following United States Letters Patent:
Sept. 26th, 1899, No. 633941
Nov. 9th, 1909, No. 939918
Feb. 15th, 1910, No. 949625

(Enlarged reproduction.)

and its presence evidences that the best materials and processes have been employed in its manufacture.

Resale selling prices by jobbers become effective as follows: In and east of Missouri River points, June 6; west of Missouri River points to Pacific coast territory, June 7; Pacific coast territory, June 9.

Distribution and Resale of Licensed Sanitary Enameled Ironware.

To purchase licensed sanitary enameled ironware, during the period beginning June 6 and ending December 31, 1910, it is necessary for you to execute a jobbers' license agreement contract, sample of which is attached, with each of the licensed manufacturers with whom you may desire to deal. Copies for signature will be sent you in duplicate by each of the licensed manufacturers, the execution of which makes you a licensed distributor of sanitary enameled ironware. Licensed ware can not be sold to you, if you have not executed these contracts.

Prices.—The selling prices to the plumber are inclosed under separate cover in loose leaf form. From these prices you will receive the discounts and rebates named in the "Jobbers' license agreement," which constitute your profit.

Profits.—On the basis that the average jobber buys in carload lots and sells in less than carload lots the per cent of profit on the selling prices will be as follows:

	Difference between C. L. and L. C. L. prices in price sheets.	Discounts named in paragraph 1, jobbers' agreement.	Discounts named in paragraph 7, jobbers' agreement.	Quantity rebates named in paragraph 8, jobbers' agreement.	Total approximate per cent profit on selling prices.
	Per cent.	*Per cent.*	*Per cent.*	*Per cent.*	
Schedules 1 and 4	5½	7½	5	2½–5	19–21
Schedules 2, 3, 4½, 5, and 6	5½	5	5	2½–5	17–19

C. L. and L. C. L. prices.—In order to obtain the benefit of carload prices, the jobber must buy in car lots for one delivery only, except at "jobbing points" where manufacturers are located.

Shipments to these points will be invoiced at carload prices in any quantity. Less than carload shipments to all other jobbing points and nonjobbing points will be invoiced to you at the less than carload prices in the sheets (all subject to the discounts and rebates hereinbefore named).

In the resale to the plumber it is not permissible to take an order for a carload and ship out in small quantities at carload prices. The plumber is entitled to carload prices at any point only when a carload is actually delivered to one purchaser in one shipment and paid for as one shipment.

Deliveries.

[From jobbers' stocks, zones 1, 2, 3, 4 and 5.]

All shipments from jobbers' stocks to other than jobbing points in zones 1, 2, 3, 4 and 5, shall be billed f. o. b. cars point of shipment.

If jobbers find it necessary on shipments from stock to nonjobbing points to equalize with other jobbing points, such equalizations shall be made on the basis of the weights given in the sheets and at the rates given in the equalizing freight tariff schedules.

[From jobbers' stocks, zones 6, 7, 8, 9, 10 and 11.]

All shipments from jobbers' stocks to other than jobbing points in zones 6, 7, 8, 9, 10 and 11 shall be billed f. o. b. cars point of shipment with actual freight allowed to nonjobbing points.

[Direct shipments from factory—all zones.]

Shipments to other than jobbing points made direct from the factory on jobbers' orders, or sales made direct to plumbers by the manufacturers, shall be billed at the prevailing zone prices plus freight charges from the nearest jobbing point, based on the weights given in the sheets and at the rates given in the freight equalizing tariff schedule.

Boxing and Crating.

These charges will be made on all goods by the manufacturers and must be made by all jobbers in the resale at the prices given in the sheets. These prices are net (subject to the discounts and rebates only that are named in the "Jobbers' License Agreement."

The same applies to charges for drilling, decorating, and other miscellaneous items shown in the sheets.

Sales by Jobbers to Other Jobbers.

Sales by one jobber to another can not be made at any better prices than those established in the resale sheets.

Guarantees.

The various conditions respecting guarantees under which the ware is purchased by the jobber shall not be varied in the resale to the plumber. Particular attention is called to the practice that has been established in the past of labeling nonguaranteed baths with the jobber's guaranteed label. This practice will be considered a violation of the jobbers' license agreement.

Additional sheets will be issued as fast as possible on items not covered in the inclosed sheets.

The discounts herein named have been compiled with as much care and accuracy as would permit in the short time allotted to distributing these sheets to the jobbing trade, and you will confer a great favor by reporting promptly any apparent discrepancies or errors.

Yours truly, E. L. WAYMAN, *Licensor.*

EXHIBIT 12.

(*Copy of Letter Sent to Each Corporation Defendant by E. L. Wayman About May* 30, 1910.)

At the time you send out the jobbers' agreement contracts to your trade, copies of which I will furnish you this week, please write them the following letter without any change in the wording given:

Enclosed find copies in duplicate of contracts covering the purchase of licensed —— sanitary enameled iron ware for the period beginning June 1st and ending Dec. 31st, 1910. Kindly execute both copies and return one copy to us at once. It is necessary for you to execute these contracts before we can sell you licensed sanitary enameled ware.

Yours truly,

(Signed) —— COMPANY,

Yours truly, E. L. WAYMAN, *Licensor.*

EXHIBIT 13.

(*Copy of Letter Sent to the Trade. See Exhibit* 12.)

[McVay & Walker, iron founders, manufacturers of porcelain enameled bath tubs, soil pipe and fittings, sinks, hoppers, etc. Corner Halket avenue and Ninth street. Established 1862. Telephone: P. & A. 312; Bell 170 Braddock.]

BRADDOCK, PA., U. S. A., *June* 4, 1910.

GENTLEMEN: We hereby withdraw all previous quotations, either verbal or written.

Inclosed find copies in duplicate of contracts covering the purchase of licensed McVay & Walker sanitary enameled iron ware for the period beginning June 1 and ending December 31, 1910. Kindly execute both copies and return one copy to us at once. It is necessary for you to execute these contracts before we can sell you licensed sanitary enameled ware.

Yours truly,

McVAY & WALKER COMPANY.

EXHIBIT 14.

(*A Letter.*)

JUNE 10, 1910.

The Western Supply Co., St. Paul, Minn.

GENTLEMEN: Replying to your letter of the 7th, it is impossible for me to give you permission to continue buying goods from the J. M. Kohler Sons Company, Sheboygan, Wis. This company has been invited to execute a license agreement and use the patent process, but has not seen fit to do so. I would like to have them execute an agreement but if they will not it is impossible to concede to any of their customers the right to purchase their goods if the customers desire to purchase licensed ware.

I hope that you will take the matter up with them and try and convince them that they should manufacture goods in accordance with the other companies.

Yours very truly, E. L. WAYMAN.

EXHIBIT 15.

(*A Letter.*)

PITTSBURG, PA., *June* 9, 1910.

The American Plumbers Supply Co., Toledo, Ohio.

GENTLEMEN: We have your order calling for a B-210 sink, but as we have not as yet received your signed contract for the resale of licensed enameled ware, we can not execute this order owing to the fact that our contract with the Licensor, Mr. E. L. Wayman, prohibits our accepting any orders after June 6 except from jobbers having signed this contract. We regret to have to take this stand but we have no alternative in the matter whatever, as our contract with Mr. Wayman is very positive on this point.

Kindly sign and return the resale contract to us at your earliest convenience, so that we will not be delayed in shipping your order, and greatly oblige,

Yours very truly,

UNITED STATES SANITARY MFG. CO.,
A. H. CLINE, JR., *Secretary.*

EXHIBIT 16.

(*A Letter.*)

W—6181013—R.]

JUNE 18, 1910.

Chandler Pump Company, Cedar Rapids, Iowa.

GENTLEMEN: I am in receipt of your telegram of to-day stating that you do not feel justified in signing at present. I trust you will

see your way clear to execute this agreement within the next few days, as it covers a matter which is entirely for the jobbers' benefit. The Cedar Rapids Pump Company of your city have executed the agreement, and I hope you will cooperate immediately with your local competitors, which will be much more advantageous than a continuous cut market.

Will you not telegraph me upon receipt of this letter that you will execute the agreement, in order that the matter may be adjusted in your city at once.

Yours very truly, E. L. WAYMAN.

EXHIBIT 17.

(*A Letter.*)

Atlas Supply Co.

MUSKOGEE, OKLA., *June* 18, 1910.

J. M. Kohler Sons Co., Sheboygan, Wis.

DEAR SIRS: We just received the following telegram from Mr. E. L. Wayman, in reply to our inquiry relative to purchases from you, to wit:

If you will sign license agreement will authorize you to handle Kohler ware subject to resale terms for reasonable length of time, with understanding that you will at once decrease your purchases, and stock licensed ware, and further sale of it, and furnish me monthly statement of purchases from Kohler. Licensed manufacturers desire to give all assistance possible to jobbers in order that they may make a fair margin of profit and do not desire to inflict any hardships, but do believe they merit the support of all jobbers in this proposition. Southwest, Kansas City Pump, Young and Crane are supporting manufacturers. Reeves wires he has put resale into effect and intends to sign. Expect U. S. Water will sign to-day. Wire answer immediately.

(Signed) E. L. WAYMAN.

As yet we have not signed any agreements, but we have put the resale price into effect to-day. There are a great many things about the agreements that do not exactly agree with our notion of a square deal. After the jobber's stock is exhausted his profit will be uncertain, as it will all depend on the quantity he sells, and even were all to sell the maximum amount the profit would still be too small for us in this locality, where everything is quite a great deal higher than in the North and East. Money is all 8 and 10 per cent, and it costs considerably more to do business than in other localities. We expect our president, Mr. J. H. McDonald to-morrow at which time the writer will go over the matter with him, and will inform you of our decision.

Yours respectfully, H. P. BOWSER.

Separate Answer of Edwin L. Wayman.

Filed November 3rd, 1910.

In the Circuit Court of the United States for the District of Maryland.

No. —. In Equity.

UNITED STATES OF AMERICA, Petitioner,
v.
STANDARD SANITARY MANUFACTURING COMPANY and Others, Defendants.

The Separate Answer of Edwin L. Wayman, One of the Defendants in the Above-entitled Action, to the Petition Herein of the United States of America, Petitioner.

The defendant now and at all times hereafter saving and reserving to himself all and all manner of benefit or advantage of exception, or otherwise, that can or may be had or taken to the many errors, uncertainties, insufficiences and imperfections in the Petitioner's said petition contained, for answer thereto, or to so much thereof as this defendant is advised is material and necessary for him to make answer to, says:

I.

That the defendant has no knowledge and has not been informed, save by the Petitioner's petition, and that he cannot set forth as to his belief, or otherwise, whether the United States of America, acting under the direction of the Attorney-General brings this proceeding in equity against this defendant and the other defendants named in the petition, and of this he demands that the said Petitioner shall furnish proof; and defendant denies the allegations contained in the preamble to said petition, that this defendant and the other defendants named in the petition, or any of them, are violating the provisions of the Act of Congress passed July 2, 1890, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies", and defendant denies that the agreements referred to in the petition are contracts, combinations or conspiracies in restraint of trade in Sanitary Enameled Iron-Ware among the several States and with foreign nations, which should either be prevented or restrained.

II.

Defendant admits that he is a resident of Pittsburgh with offices in the Arrott Building in that City, as set forth in Subdivision I of said petition.

As to the other allegations contained in Subdivision I, defendant has no knowledge and has not been informed, save by Petitioner's petition, and except as so informed defendant cannot set forth his belief, or otherwise, as to whether the defendants in said subdivision

referred to are the corporations as described, whether the individuals are the officers and directors thereof as described, and as to whether such officers and directors participate in the management and direction of the business of the corporation defendants of which they are respectively alleged to be officers and directors and are responsible therefor, and as to these facts defendant demands that Petitioner shall furnish proof.

Defendant has no knowledge and has not been informed, save by the Petitioner's petition, and except as so informed defendant cannot set forth as to his belief, or otherwise, whether the defendants referred to in Subdivision II have been for many years and now are engaged in the manufacture of Sanitary Enameled Iron-Ware, such as bath-tubs, wash-bowls, lavatories, drinking fountains, sinks, closets, urinals, etc., at their several factories located as stated in said petition, and as to these facts defendant demands that Petitioner shall furnish proof.

Defendant has no knowledge and has not been informed, save by Petitioner's petition, and except as so informed defendant cannot set forth as to his belief, or otherwise, whether the defendants referred to in the first full paragraph on page 10 of the petition have been for many years and now are engaged in selling and shipping from their various places of manufacture said products of enameled iron-ware into the several States of the United States other than those wherein the said articles have been manufactured as aforesaid; and as to all the other allegations in said paragraph referred to defendant denies any knowledge, information or belief, except as informed by the petition herein, and as to these facts defendant demands that Petitioner shall furnish proof.

Defendant has no knowledge and has not been informed, save by Petitioner's petition, and except as so informed defendant cannot set forth as to his belief, or otherwise, whether the only manufacturers and dealers in articles of similar character, that is, Sanitary Enameled Iron-Ware, other than the defendants named in said petition are J. M. Kohler Sons Company, of Sheboygan, Wis., The Iron City Sanitary Manufacturing Company of Pittsburgh, Pa., Blairsville Enameled Ware Company of Blairsville, Pa., Clymer Manufacturing Company of Indiana, Pa., Louis Lipp of Cincinnati, Ohio, and Washington Iron Works of Los Angeles, Cal., and as to these facts defendant demands that Petitioner shall furnish proof.

Defendant has no knowledge and has not been informed, save by Petitioner's petition, and except as so informed defendant cannot set forth as to his belief, or otherwise, whether of the total volume of interstate and foreign trade and commerce in said products of Sanitary Enameled Iron-Ware being carried on by the defendants and by the six manufacturers and dealers named in the foregoing paragraph, the defendants named in the petition have and control eighty-five per *per* cent. (85%), or any similar amount, and as to these facts defendant demands that Petitioner shall furnish proof.

Defendant suggests that the allegation in the last paragraph of Subdivision II on page 11 of the petition is, as he is advised, purely a conclusion, which he need not answer, although to his silence in

this behalf no admission as to the truth of such conclusions is to be imputed; but that if said allegation requires an answer, defendant denies any knowledge, information or belief with respect thereto and demands that Petitioner shall furnish proof.

Defendant denies that he and the other defendants named in said petition, or any of them, are, or have been, engaged in any unlawful combination and conspiracy in restraint of interstate trade and commerce, or in any unlawful attempt to monopolize the same, as described in the last paragraph of Subdivision II on page 11 of said petition, or otherwise.

III.

Defendant denies that during the latter part of the year 1909, or early in 1910, or at any time, he engaged in a combination or conspiracy in restraint of interstate and foreign trade and commerce in Sanitary Enameled Iron-Ware, described in the petition, with the defendants, or any of them, in the manner set forth in Subdivision III of the petition, or otherwise, or that since that time the other defendants, or any of them, have been, or now are, engaged in such combination or conspiracy, or that interstate and foreign commerce has been or is now being restrained by any combination or conspiracy of the defendant with the other defendants, or any of them, in the manner alleged in the petition, or otherwise.

Defendant denies that the defendants by agreement have unlawfully, or at all, eliminated or suppressed competition between each other as to the prices at which they are selling in interstate and foreign commerce their products in Sanitary Enameled Iron-Ware, or that they have unlawfully, or at all, fixed or established, or are now maintaining uniform prices and terms of sale to their respective customers.

Defendant denies that the discounts which the defendants named in the petition quote and allow to jobbers in carrying on such commerce are arrived at by agreement between the defendants, or that each defendant quotes and allows such discounts only as are agreed upon, known to, and accepted by the other defendants.

Defendant avers that each of the corporation defendants has separately taken a license from the defendant, under Letters Patent of the United States No. 633,941 issued September 26, 1899, to James W. Arrott, Jr., for a dredger for pulverulent material, No. 949,625 issued February 15, 1910, to E. Ditheridge for a pneumatic sieve, and No. 939,918 issued November 9, 1909, to William Lindsay for an enameling powder distributer, which licenses are similar to Exhibit 8 attached to the petition, and that licensed Sanitary Enameled Iron-Ware is sold to jobbers under agreements similar to Exhibit 9 attached to the petition; but the defendant begs leave, upon the hearing of this cause, to refer to the originals of said licenses and said Jobbers' License Agreements for greater particularity. And, except as herein admitted, the defendant denies the allegations contained in the two full paragraphs on page 12 of the petition.

Defendant denies that the combination alleged in the paragraph commencing at the bottom of page 12 of the petition exists, or that

the result of the alleged combination is that throughout the United States all purchasers and users of the aforesaid products of Sanitary Enameled Iron-Ware are obliged to pay the same prices, or that such prices have been, or are now fixed by the defendants named in the petition, or otherwise, by mutual agreement, without competition with each other, or otherwise.

Defendant denies that he and the other defendants, or any of them, have devised means by which each of them is advised of the amount of the output of each of the other defendants in order that thereby they may by agreement limit and restrict the respective outputs, as may seem advisable; and avers that none of the other defendants named in the petition derive, under the terms of the licenses, any knowledge of the output of any of the other defendants, and that at no time is any information so gained for the purpose of limiting or restricting the respective outputs.

Defendant denies that by the alleged system of dividing the United States into zones, or any other system of contracts, jobbers are restricted in making sales to the zone in which said jobber is located; he denies that there is any arrangement whereby the jobber is not allowed to sell outside of his alleged zone; he denies that the manufacturers have adopted the feature alleged, or any other unlawful feature, to restrict the competition between jobbers, and to enable them to hold the jobbers firmly to the alleged selling arrangement and to the re-sale prices fixed by the combination, the existence of which alleged selling arrangement and of said alleged combination defendant denies; and avers that the defendant has separately licensed the several defendant corporations upon terms more fully set forth in said licenses and Jobbers' License Agreements, to the originals of which for greater particularity the defendant begs leave to refer upon the hearing of this cause; except as stated the defendant denies all the allegations in the said second paragraph on page 13 of the petition.

Defendant denies that the defendants by agreement or otherwise, have largely and unreasonably increased the prices at which they sell their products to the jobbers; the defendant denies that the defendants have more particularly advanced the re-sale prices of jobbers by their alleged system of contracts controlling re-sale prices, and avers that there is no agreement among the defendants, or any of them, as alleged.

Defendant denies that the defendants, or any of them, are cooperating in fighting the manufacturers of Sanitary Enameled Iron-Ware, or dealers therein, in interstate commerce, who have not become parties to the alleged combination, and denies the existence of the alleged combination; and defendant further denies that all of the defendants, or any of them, have united, or are engaged in a common effort to force the said manufacturers or dealers into the alleged combination, or to drive them out of business. Defendant denies the other allegations in said paragraph contained, and avers that the terms upon which the several manufacturers named as defendants in the petition sell to jobbers are fixed in the licenses which defendant has given, to the originals of which for greater particu-

larity the defendant begs leave to refer upon the hearing of this cause.

Defendant denies that the defendants have been establishing or enforcing a system of severe penalties which are imposed upon such members of the alleged combination as depart from the alleged rules respecting prices and terms fixed by the alleged combination, and denies that there is any combination among the defendants, or any of them. Defendant denies each and every other allegation in the first full paragraph on page 14 of the petition contained, and avers that the full terms upon which the several manufacturers, defendants herein, are licensed, are set forth in the licenses above referred to, to the originals of which for greater particularity the defendant begs leave to refer upon the hearing of this cause.

IV.

Defendant denies that the defendants, or any of them, have entered into any combination of the character described in the petition, or otherwise, and further denies each and every other allegation in said first paragraph in Subdivision IV contained; and avers that the licenses which defendant has given to the various licensees have been given in good faith, and upon the advice of counsel to the effect that they were based upon the patent laws of the United States, and that defendant is advised and believes the same to be lawful, and defendant is informed that the several defendants herein have been similarly advised and entertain similar beliefs.

Defendant denies the alleged conditional assignment of the three patents, or any of them, referred to in the said petition, in the second paragraph of Subdivision IV, or that he was selected as the assignee thereof by agreement of all the defendants, or of any of them, and each and every of the other allegations in said paragraph contained.

Defendant avers that he is the owner of the three patents specified in the full paragraph on page 15 of the petition, and that he purchased the same from certain of the defendants herein pursuant to certain several options; and he avers that the contracts of purchase are in writing, to the originals of which for greater particularity he begs leave to refer on the trial of this cause. Except as averred, the defendant denies that he purchased said patents as the result of any agreement such as alleged in the petition, or otherwise, between him and the other defendants herein, or any of them, and further denies, except as herein stated, each and every allegation contained in said full paragraph on page 15.

Defendant admits that prior to the granting of the licenses by the defendant to the various defendants, certain of them had manufactured their product without the use of the inventions covered by such patents, and defendant admits that the inventions covered by the said letters patent are useful and valuable in the manufacture of Sanitary Enameled Iron-Ware; but defendant denies each and every other allegation in the first full paragraph on page 16 contained.

Defendant denies that before the assignments to him of the Letters Patent referred to were made all the defendants, or any of them, had

agreed upon all the essential features of the licensing agreement. The defendant denies any agreement among the defendants whereby the defendant was to become the ostensible licensor, or that he was the ostensible licensor, and denies that a price list had been agreed upon among the defendants, or any of them, and he denies each and every other allegation in said paragraph contained; and avers that there was no agreement among the manufacturers, and avers that before any arrangement had been made with any manufacturer he had secured an option for the purchase of the Arrott and other patents.

Defendant admits that Exhibits 8, 9 and 10 respectively, attached to the petition, are generally correct copies of the Manufacturers' License Agreement, the Jobber's License Agreement, and a part of the Price List, but for greater particularity begs leave to refer to the originals thereof upon the trial of this action.

Defendant denies that Exhibits 1 to 7 attached to the petition evidence the manner in which the license arrangement was arrived at; that Exhibits 11 to 17 attached to the petition illustrate the methods of the defendants and the effect of the combination upon independent manufacturers and jobbers who have not signed the license agreements, and begs leave upon the trial hereof to refer to the originals of said Exhibits for greater particularity.

Defendant denies that all the terms and conditions of the contracts and agreements which together make up the alleged licensing arrangement, had been agreed upon by all the defendants, or any of them, prior to the assignment of the patents to the defendant. Defendant denies that each defendant stipulated as a condition to his executing the License Agreement that all the others should execute a similar agreement. Defendant denies the allegation that no defendant would have executed the agreement unless he had been certain that all of the other defendants would execute it. Defendant denies that the agreement on the part of all of the defendants to enter into the license arrangement was a condition precedent to the assignment of the patents to Wayman, and denies the existence of any agreement on the part of all the defendants, or any of them, to enter into the License Agreement as a condition precedent to the assignment to defendant. Defendant denies the allegation that there would not have been an assignment to him, or that no License Agreement with any of the defendants would have been arrived at, if all the corporation defendants had not agreed to go into the alleged scheme. Defendant denies the allegation that all the parties to the alleged arrangement were not seeking the use of a valid and essential patent necessary in the carrying on of their business, and that they were engaged in a price-fixing plan to wrongfully and unlawfully eliminate competition; and denies each and every other allegation in said paragraph on pages 17 and 18 of the petition contained.

V.

Defendant denies each and every allegation in Subdivision V of the petition contained.

VI.

Defendant denies all the allegations contained in Subdivision VI of the petition, except that he admits that the defendants A. Weiskittel & Son Co., Anton Weiskittel and John D. Heise are located and doing business within the State and District of Maryland, and that said individual defendants reside therein.

Furthermore, and for a more complete answer, the defendant says:

VII.

That prior to the invention of James W. Arrott, Jr., covered by Letters Patent of the United States No. 633,941, issued September 26, 1899, to said Arrott for enameling sanitary enameled iron ware, Sanitary Enameled Iron Ware was enameled by a hand process. This process consisted, generally, of sifting over the surface of the iron-ware, when heated to a red heat, the enameling powder. Enameling powder is supposed and intended to consist of such materials as when fused to form on the iron to be enameled a hard, impenetrable, insoluble, smooth and glossy surface. A sieve containing a quantity of the powder was attached to the end of a handle. The workman held the handle of the sieve with one hand and arm and moved the sieve horizontally over the surface of the iron-ware to be enameled, at the same time striking the handle with his other hand to cause the sieve to vibrate and sift the enameling powder over the surface of the iron-ware to be enameled. The powder jetted through the sieve in intermittent puffs or waves with each blow, and this, and the physical strain and intense heat caused, in a great many instances, the unequal distribution of the powder over the surface of the ware, which resulted in the enameling being wavy or rippled, uneven, or otherwise defective, and rendered the article enameled unsightly, less durable and unsaleable at a profit. The workman on account of the intense heat went through the enameling process as hurriedly as possible, with the result, in a great many instances, that the articles produced were worthless and had to be thrown away, or were so-called "seconds" and had to be sold at a price resulting in little, or no profit to the manufacturer. The process was laborious and slow, and consequently more readily fusible enameling powder had to be used which resulted in a less impervious, insoluble and durable and permanently glossy surface. Furthermore, it was injurious to the health of the workman and it was difficult to secure men physically capable of performing the work, and more difficult to train such men, as were capable, to do the work properly.

Arrott's invention, by using a mechanically operated agitator, in connection with the sieve, made possible the flowing of the enameling powder in a continuous stream, enabling the enameler to distribute the enameling powder evenly, equally and uniformly over the surface of the article to be enameled, as though the powder were a flowing thin liquid. With Arrott's invention, a workman can, by touching a valve button, secure a rapping action which is rapid, continuous and uniform. At the same time his hands are free both to sustain the load and to move the sieve over the surface and get a

uniform lateral powder distribution. The blows are so rapid and regular that the powder, instead of jetting through the sieve in a puff or distinct wave with each hand-struck blow, flows in a practically continuous regular sheet. Arrott's invention enables the enameler to be under a much less strain in the face of terrific heat, it enables him to enamel a very much greater number of articles per hour, and the work can be done by an average man of less physical strength than was required in the former process, and he can be more easily and quickly taught to do the enameling successfully. Arrott's invention is labor and material saving, and effective, and in relieving to a degree labor under fierce heat conditions arose to the plane of the humane.

VIII.

The manufacturers of sanitary enameled iron-ware recognized the necessity of Arrott's invention to the successful manufacture of Sanitary Enameled Iron-Ware. Many of them used the invention described in the patent, or equivalent means, for enameling the iron-ware. In all cases the owner of the patent claimed that such manufacturers were infringing the patent and demanded an accounting and damages under threat of suit for infringement. Some of the manufacturers settled with the owner of the Arrott patent by paying a lump sum of money in settlement of the claim for damages and claimed to have abandoned the use of the invention. Others sought to gain time, well knowing that in the end they would have to stand suit for infringement, pay damages, abandon the use of the invention, or take a license under the patent. Others without formally taking a license, made periodical payments to the owner of the patent in order to be allowed to continue the use of the invention. Still others were sued for infringement and judgments obtained against them by the owner of the patent, which judgments were settled by the payment of a sum of money.

IX.

Prior to the defendant granting the licenses herein referred to, the Arrott patent had been sustained by the Courts in several cases.

X.

For the reasons stated, the art was in a very unsatisfactory condition. No means had been discovered of accomplishing the result produced by the use of the Arrott invention without laying the user of such means open to a suit for infringement, by the owner of the Arrott patent. The manufacturers using the process in use prior to Arrott's invention, were unable to successfully compete with those using the Arrott invention, and moreover, produced a disproportionate number of defective, unsightly and substantially unsaleable articles. The consumer was deceived and defrauded and the use of Sanitary Enameled Iron-Ware lessened and its reputation depreciated by defective articles being palmed off on the consumer as not defective.

XI.

Defendant had been a manufacturer of enameled bath tubs, was familiar with the needs of the trade and its conditions and knew the value of the Arrott invention. He conceived the idea of purchasing the Arrott patent and certain other patents in the same art and issuing licenses to the various manufacturers of Sanitary Enameled Iron-Ware, under the belief that, by so doing, he could make a large sum of money, and that such an arrangement would render the trade in Sanitary Enameled Iron-Ware stable and would be highly beneficial to manufacturers, jobbers and the public by causing the general use of the Arrott invention and by doing away with a large portion of the defective articles produced by the former process.

With this purpose in view, defendant, in the early part of the year 1908, began negotiations to secure such patents. Still pursuing the same purpose, defendant took steps to purchase the Arrott invention from the Standard Sanitary Manufacturing Company. As a part of said arrangement, defendant secured an option upon the Arrott patent in the latter part of the year 1909. He also made arrangements to secure the Ditheridge patent from J. L. Mott Iron Works, and the Lindsay patent from the L. Wolff Manufacturing Company. Defendant secured such options because he knew that, in order to make the purchase of the patents profitable to him, he had to secure the agreement of a considerable number of manufacturers of Sanitary Enameled Iron-Ware to take licenses upon terms which would yield him a fair royalty, secure the conduct of the business in such a manner as to insure the payment of the royalty and to preserve and enhance the value of the invention; and he wished to ascertain whether this could be done before paying out a large sum of money in the purchase of the Arrott and other patents.

It was necessary that a fair royalty should be fixed; that the defendant should be able to prescribe the prices at which Sanitary Enameled Iron-Ware should be sold in order that the licensees should be able to pay the royalty and still make a profit, and conduct their business in such a way as to most successfully utilize the Arrott and other inventions, and that the prices should be maintained at such figures. Defendant realized that while the Arrott and other inventions would enable him, provided he could secure a sufficient number of licensees at a proper royalty, to make a large sum of money, it was necessary in order to secure such licensees, for him to offer them an opportunity of themselves making a profit out of the transaction.

Defendant consulted counsel with regard to the proposed purchase by him of the Arrott and other inventions covered by Letters Patent of the United States, and the license agreements which he proposed to make to the various manufacturers of Sanitary Enameled Iron-Ware under those patents, and was advised by counsel that the purchases proposed, and the licenses proposed were in pursuance of the patent laws of the United States and were in accordance with and covered by such statutes, and the decisions thereunder; that the steps that he proposed to take were entirely lawful and not in violation of any laws of the United States, or of the sev-

eral States, and particularly not in violation of the Act of Congress approved July 2, 1890, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies."

On or about March 2, 1910, defendant prepared a form of agreement to grant licenses under the Arrott and other patents. Defendant personally visited each of the manufacturers of Sanitary Enameled Iron-Ware whose names are signed to said agreement separately at their various places of business and procured their signatures to said agreement separately and on different dates without any concert or agreement as between themselves among the manufacturers. What purports to be a copy of said agreement is attached to the petition, marked "Exhibit 3". Defendant begs leave to refer to the original of said agreement, when produced upon the hearing on this petition, for the particulars of such agreement, as if the same were herein fully set forth.

XII.

Defendant had licenses and jobbers' license agreements prepared, embodying certain terms and conditions which he proposed to prescribe to those taking licenses under said patents, and from time to time presented said licenses and said jobbers' license agreements to the several corporation defendants with full explanations in regard to the same, and at the same time requested an opinion of counsel to be given to such corporation defendants, which said opinion was that the proposed licenses were fully covered by the patent laws of the United States and the decisions thereunder, were entirely lawful and not in violation of the laws of the United States or of any of the several States, and particularly not in violation of the Act of Congress commonly known as the Sherman Anti-Trust Act.

On information and belief defendant alleges that the defendants named in the petition, other than the defendant Wayman, thereupon severally consulted counsel of their own selection with regard to the legality of the said licenses and the jobbers' license agreements, and were advised by such counsel that the same were in all respects lawful, and not in violation of the laws of the United States or of any of the several States.

Defendant being satisfied that he had secured agreements with a sufficient number of manufacturers of sanitary enameled iron-ware to make the purchase by him of the patents profitable, proceeded, before the expiration of his options, to procure absolute assignments of said patents, and said patents, for a valuable consideration, were absolutely assigned in writing to the defendant, and defendant is the absolute owner of said patents, without anyone else having any interest therein. Defendant asks leave on the trial hereof to refer to the originals of said assignments as if the same were set out in full herein.

Negotiations were thereupon conducted between the defendant Wayman on the one side and the several other defendants named in the petition severally on the other, which resulted in a form of agreement as to details of the terms and conditions embodied in the

licenses and jobbers' license agreements of which exhibits 8 and 9, attached to the petition herein, purport to be copies.

Defendant begs leave to refer to the originals of said licenses and jobbers' license agreements when produced upon the hearing herein, for greater particularity, as if the same were fully set forth herein.

XIII.

Defendant issued licenses to the various corporation defendants named herein severally, and to various other persons, upon various dates, as follows:

Standard Sanitary Manufacturing Co	May 6, 1910
A. Weiskittel & Son Co	May 6, 1910
The Barnes Manufacturing Co	May 6, 1910
The Cahill Iron Works, agreed to sign May 29, 1910, actually signed	July 6, 1910
Colwell Lead Works	May 25, 1910
The Day-Ward Company	May 6, 1910
The Humphryes Manufacturing Co	May 6, 1910
Kerner Manufacturing Co	May 6, 1910
The J. L. Mott Iron Works	May 6, 1910
McVay-Walker Co.	May 6, 1910
The McCrum-Howell Co	May 6, 1910
The National Sanitary Manufacturing Co	May 6, 1910
United States Sanitary Manufacturing Co	May 6, 1910
L. Wolff Manufacturing Co	May 6, 1910
Wheeling Enameled Iron Works	May 6, 1910
Union Sanitary Manufacturing Company	May 6, 1910

That since defendant issued these licenses the other defendants named in the petition herein have been and are now using the inventions covered by said letters patent, and as to which they are licensed, in the manufacture of Sanitary Enameled Iron-Ware.

Defendant is advised by counsel, and upon information and belief avers that the other defendants named in the petition are advised by their respective counsel, and therefore avers, that the said licenses are in all respects lawful, and that in acting in compliance therewith they are not violating the laws of the United States or of any of the several States, and particularly are not violating the Act of Congress commonly known as the Sherman Anti-Trust Act.

And this defendant denies all and all manner of unlawful combination and confederacy wherewith he is by the said petition charged; without this, there is any other matter, cause or thing in said petitioner's said petition contained material or necessary for this defendant to make answer to, and not herein and hereby well and sufficiently answered, confessed, traversed, and avoided or denied, is true, to the knowledge or belief of this defendant, all which matters and things this defendant is ready and willing to aver, maintain and prove as this honorable court shall direct; and humbly

prays to be hence dismissed, with his reasonable costs and charges in this behalf most wrongfully sustained.

EDWIN L. WAYMAN.
NOBLE, JACKSON & HUBBARD,
CARROL T. BOND,
Solicitors for Defendant.

HERBERT NOBLE,
EDWIN E. JACKSON, JR.,
WILLIAM L. MARBURY,
Of Counsel.

STATE OF NEW YORK,
County of New York, ss:

Edwin L. Wayman, being duly sworn, deposes and says that he has read the foregoing answer and knows the contents thereof; that the same is true to his own knowledge except as to the matters therein stated to be alleged on information and belief and as to those matters he believes it to be true.

EDWIN L. WAYMAN.

Sworn to before me this 28th day of October, 1910.
[NOTARIAL SEAL.]
C. MACINNES,
Notary Public, Kings County.

Certificate filed in New York County.

Answer of Standard Sanitary Manufacturing Company and Others.

Filed November 3rd, 1910.

In the Circuit Court of the United States for the District of Maryland.

No. —. In Equity.

UNITED STATES OF AMERICA, Petitioner,
v.
STANDARD SANITARY MANUFACTURING COMPANY and Others, Defendants.

The Joint and Several Answer of the Standard Sanitary Manufacturing Company, The J. L. Mott Iron Works, L. Wolff Manufacturing Company, Theodore Ahrens, Francis J. Torrance, E. L. Dawes, W. A. Myler, Jordan L. Mott, Max Goebel, Ludwig Wolff and Herman Hoelscher, Defendants, to the Petition Herein of the United States of America, Petitioner.

The defendants severally now and at all times hereafter saving and reserving to themselves all and all manner of benefit or advantage of exception, or otherwise, that can or may be had or taken

to the many errors, uncertainties, insufficiencies and imperfections in the said petition contained, for answer thereto, or to so much thereof as these defendants are advised is material and necessary for them to answer to, say:

I.

Defendants have no knowedge and have not been informed, save by the Petitioner's petition, and except as so informed they cannot set forth as to their belief, or otherwise, whether the United States of America, acting under the direction of the Attorney General, brings this proceeding in equity against these defendants and the other defendants named in the petition, and of this they demand that the said petitioner shall furnish proof; and the defendants deny the allegations contained in the preamble to said petition, that these defendants and the other defendants named in the petition, or any of them, are violating the provisions of the Act of Congress passed July 2, 1890, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies." And defendants deny that the agreements referred to in the petition are contracts, combinations or conspiracies in restraint of trade in Sanitary Enameled Iron-Ware among the several States and with foreign nations, which should either be prevented or restrained.

Defendants suggest that the allegation in the last paragraph at the bottom of page eight of the petition, as they are advised, is purely a conclusion which they need not answer, although to their silence in this behalf no admission as to the truth of such conclusion is to be imputed.

II.

The defendants suggest that the allegations in the first paragraph on page 10 of said petition that the defendants are engaged in interstate and foreign trade and commerce in Sanitary Enameled Iron-Ware within the meaning of the Act of 1890, commonly known as the Sherman Anti-Trust Act, are, as they are advised, purely a conclusion although to their silence in this behalf no admission as to the truth of this conclusion is to be imputed.

Defendants have no knowledge and have not been informed, save by the petition herein, and except as so informed, defendants cannot set forth as to their belief, or otherwise, whether the only manufacturers and dealers in articles of similar character, that is Sanitary Enameled Iron-Ware, other than the defendants named in said petition are J. M. Kohler Sons Company at Sheboygan, Wis., The Iron City Sanitary Manufacturing Company of Pittsburgh, Pa., Blairsville Enameled Ware Company of Blairsville, Pa., Clymer Manufacturing Company of Indiana, Pa., Louis Lipp of Cincinnati, Ohio, and Washington Iron Works of Los Angeles, Cal., and as to these facts, defendants demand that petitioner shall furnish proof.

Defendants have no knowledge and have not been informed, save by the petition herein, and except as so informed cannot set forth as to their belief, or otherwise, whether of the total volume of interstate and foreign trade and commerce in said products of Sanitary Enameled Iron-Ware being carried on by the defendants, and by

the six manufacturers and dealers named in the foregoing paragraph, the defendants named in the petition have and control 85%, or any similar amount, and as to these facts defendants demand that petitioner shall furnish proof.

Defendants suggest that the allegations in the last paragraph of Subdivision II, page 11 of the petition are, as they are advised, purely conclusions which they need not answer although to their silence in this behalf no admission as to the truth of such conclusions is to be imputed; but, if such allegations require an answer, defendants deny any knowledge, information or belief with respect thereto and demand that petitioner shall furnish proof.

Defendants deny that they or any of them or any of the other defendants named in the petition are, or have been, engaged in any unlawful combination or conspiracy in restraint of interstate trade and commerce, or in any unlawful attempt to monopolize the same, as described in the last paragraph of Subdivision II on page 11 of the said petition, or otherwise.

III.

Defendants deny that during the latter part of the year 1909 or early in 1910, or at any time they, or any of them, engaged in a combination or conspiracy in restraint of interstate and foreign trade and commerce in Sanitary Enameled Iron-Ware, in the manner set forth in Subdivision III of the petition, or otherwise, either among themselves or with any of the defendants named in the petition, or that since that time they, the other defendants, or any of them have been, or now are, engaged in such combination or conspiracy, or that interstate and foreign commerce has been or is now being restrained by any combination or conspiracy of the defendants among themselves, or with the other defendants, or any of them, in the manner alleged in the petition, or otherwise.

Defendants deny that by agreement either among themselves, or with the other defendants named in the petition, they have unlawfully, or at all, eliminated or suppressed competition between each other as to prices at which they are selling in interstate and foreign commerce their products in Sanitary Enameled Iron-Ware, or that they have unlawfully, or at all, fixed or established or are now maintaining uniform prices and terms of sale to their respective customers.

The defendants deny that the discounts which the defendants named in the petition quote and allow to jobbers in carrying on such commerce are arrived at by agreement between the defendants among themselves, or that each defendant quotes and allows such discounts only as agreed upon, known to and accepted by the other defendants named in the petition.

Defendants aver that each of the corporation defendants here answering has separately taken a license from the defendant Edwin L. Wayman, under Letters Patent of the United States No. 633,941, issued September 26, 1899, to James W. Arrott, Jr., for a dredger for pulverulent material, No. 949,625, issued February 15, 1910, to E. Ditheridge for a pneumatic sieve, and No. 939,918, issued No-

vember 9, 1909, to William Lindsay for an enameling powder distributer, which licenses are similar to Exhibit 8 attached to the petition, and that licensed Sanitary Enameled Iron-Ware is sold by the defendants to jobbers under agreements similar to Exhibit 9 attached to the petition, but the defendants beg leave upon the hearing of this cause, to refer to the originals of said licenses and said Jobbers' License Agreements for greater particularity. And, except as herein admitted, the defendants deny the allegations contained in the two full paragraphs on page 12 of the petition.

Defendants deny that the combination alleged in the paragraph commencing at the bottom of page 12 of the petition exists, or that the result of the alleged combination is that throughout the United States all purchasers and users of the aforesaid products of Sanitary Enameled Iron-Ware are obliged to pay the same prices, or that such prices have been or are now fixed by the defendants named in the petition by mutual agreement, or otherwise, without competition with each other or otherwise.

Defendants deny that they, or any of them, have devised means by which each of them is advised of the amount of output of each of the other defendants named in the petition in order that thereby they may, by agreement limit and restrict respective outputs as may seem advisable; and aver that they do not derive, under the terms of the licenses, knowledge of the output of any of the defendants named in the petition, and aver that at no time is any information so gained for the purpose of limiting and restricting their respective outputs.

Defendants deny that they have divided the United States into certain territorial or geographical zones, and they further deny that by the alleged system of dividing the United States into zones, or any other system of contracts, jobbers are restricted in making sales to the zone in which such jobber is located. They deny that there is any arrangement whereby the jobber is allowed to sell outside of his alleged zone. They deny that the manufacturers have adopted the feature alleged, or any other unlawful feature, to restrict the competition between jobbers and to enable them to hold the jobbers firmly to the alleged selling arrangement and to the re-sale prices fixed by the combination, the existence of which alleged selling arrangement and said alleged combination defendants deny; and defendants aver that the defendant, Wayman, has separately licensed the several defendant corporations upon terms more fully set forth in said licenses and jobbers' license agreements, to the originals of which for greater particularity the defendants beg leave to refer upon the hearing of this cause; except as stated, the defendants deny all the allegations in said second paragraph on page 13 of the petition.

The defendants deny that among themselves or by agreement with the other defendants named in the petition, or otherwise, they have largely and unreasonably increased the prices at which they sell their products to jobbers; defendants deny that the defendants have more particularly advanced the re-sale prices of jobbers by their alleged system of contracts controlling re-sale prices, and aver that

there is no agreement among the defendants named in the petition, or any of them, as alleged.

The defendants deny that the defendants named in the petition, or any of them, are co-operating in fighting the manufacturers of Sanitary Enameled Iron-Ware, or dealers therein, in interstate commerce who have not become parties to the alleged combination, and deny the existence of the alleged combination; and the defendants further deny that all of the defendants, or any of them, have united or are engaged in a common effort to force the said manufacturers or dealers into the alleged combination, or to drive them out of business.

Defendants deny the other allegations in said paragraph contained and aver that the terms upon which the several manufacturers sell to jobbers are fixed in the licenses which the defendant, Wayman, has given, to the originals of which for greater particularity the defendants beg leave to refer upon the hearing of this cause.

Defendants deny that they, or any of the defendants named in the petition, have been establishing and enforcing a system of severe penalties which are imposed upon such members of the alleged combination as depart from the alleged rules respecting prices and terms fixed by the alleged combination, and deny that there is any combination among the defendants, or any of them. Defendants deny each and every other allegation in the first full paragraph of said petition on page 14, and aver that the full terms upon which the several manufacturers, defendants herein, are licensed, are set forth in the licenses above referred to, to the originals of which for greater particularity the defendants beg leave to refer upon the hearing of this cause.

IV.

Defendants deny that the defendants named in the petition, or any of them, have entered into any combination of the character described in the petition, or otherwise, and further deny each and every other allegation in said first paragraph of Subdivision IV.; and aver that the licenses which the defendant, Wayman, has given to the various licensees have been given by the defendant, Wayman, and accepted by the defendants in good faith and upon the advice of counsel to the effect that such licenses were based upon the patent laws of the United States and that defendants are advised and believe the same to be lawful, and defendants are informed that the other defendants named in the petition herein have been similarly advised and entertain similar beliefs.

Defendants deny the alleged conditional assignment of the three patents, or any of them, referred to in the said petition in paragraph 2 of Subdivision IV., or that the defendant, Wayman, was selected as the assignee thereof by agreement of the defendants, or any of them, or any of the defendants named in the petition, and defendants deny each and every of the other allegations in said paragraph contained.

Defendants aver that the defendant Wayman is the owner of the three patents specified in the full paragraph on page 15 of the peti-

tion, and that he purchased the same severally from these answering defendants pursuant to certain several options.

And defendants further aver that the contracts under which said defendant Wayman purchased the said patents are in writing, to the originals of which for greater particularity the defendants beg leave to refer on the trial of this cause.

Except as averred these answering defendants deny that the said purchases were made as the result of any agreement between the defendant Wayman and these answering defendants, or any of them, or any of the defendants named in the petition; and further deny, except as herein stated, each and every allegation in said full paragraph on page 15 contained.

Defendants admit that prior to the granting of the licenses by defendant, Wayman, to the various defendants named in the petition, certain of them had manufactured their product without the use of the inventions covered by such patents, and the defendants admit that the inventions covered by the said Letters Patent are useful and valuable in the manufacture of Sanitary Enameled Iron-Ware; but defendants deny each and every other allegation in the first full paragraph on page 16 of the petition contained.

Defendants deny that before the assignments to the defendant, Wayman, of the Letters Patent referred to were made they had agreed either with him, or among themselves, or with any of the defendants named in the petition, upon all the essential features of the licensing agreement. Defendants deny any agreement among themselves, or with the other defendants named in the petition, or any of them, whereby defendant, Wayman, was to become the ostensible licensor, or that he was the ostensible licensor, and deny that a price list had been agreed upon between defendant, Wayman, and these defendants, or among themselves, or with any of the other defendants named in the petition, and they deny each and every other allegation in said paragraph contained, and aver that there was no agreement among the manufacturers and aver that before any agreement had been made with any manufacturer defendant Wayman had secured an option for the purchase of the Arrott and other patents.

Defendants admit that Exhibits 8, 9 and 10 respectively, attached to the petition, are generally correct copies of the manufacturers' license agreement, the jobbers' license agreement, and a part of the price list, but for greater particularity beg leave to refer to the originals thereof upon the trial of this action.

Defendants deny that Exhibits 1 to 7, attached to the petition, evidence the manner in which the license arrangement was arrived at; that Exhibits 11 to 17, attached to the petition, illustrate the methods of the defendants and the effect of the combination upon independent manufacturers and jobbers who have not signed the license agreements, beg leave upon the trial hereof to refer to the originals of said exhibits for greater particularity.

Defendants deny that all the terms and conditions of the contracts and agreements which together make up the alleged licensing arrangement had been agreed upon by all the defendants, or any of them, prior to the assignment of the patents to the defendant Way-

man. The defendants deny that each defendant stipulated, as a condition precedent to his executing the license agreement, that all the others should execute a similar agreement. Defendants deny the allegation that no defendant would have executed the agreement unless he had been certain that all of the other defendants would execute it. Defendants deny that the agreement on the part of all of the defendants to enter into the license arrangement was a condition precedent to the assignment of the patents to defendant Wayman, and defendants deny the existence of any agreement on the part of all the defendants, or any of them, to enter into the license agreement as a condition precedent to the assignment to defendant Wayman. Defendants deny the allegation that there would not have been an assignment to the defendant Wayman, or that no license agreement with any of the defendants would have been arrived at if all the corporation defendants had not agreed to go into the alleged scheme. Defendants deny the allegation in the petition that all the parties to the alleged arrangement were not seeking the use of a valid and essential patent necessary in the carrying on of their business, and defendants further deny that they were engaged in a price fixing plan to wrongfully and unlawfully eliminate competition; and deny each and every other allegation in said paragraph on pages 17 and 18 of the petition contained.

V.

Defendants deny each and every allegation in Subdivision V of the petition contained.

VI.

Defendants deny all the allegations contained in Sub-division VI of the petition, except that they admit that the defendants A. Weiskittel & Son Company, Anton Weiskittel and John D. Heise are located and doing business within the State and District of Maryland, and that said individual defendants reside therein.

Furthermore, and for more complete answer, the defendants say:

VII.

That prior to the invention of James W. Arrott, Jr., covered by Letters Patent of the United States No. 633,941, issued September 26, 1899, to said Arrott for enameling sanitary enameled iron-ware, Sanitary Enameled Iron-Ware was enameled by a hand process. This process consisted generally of sifting over the surface of the iron-ware, when heated to a red heat, the enameling powder. Enameling powder is supposed and intended to consist of such materials as when fused to form on the iron to be enameled a hard, impenetrable, insoluble, smooth and glossy surface. A sieve containing a quantity of the powder was attached to the end of a handle. The workman held the handle of the sieve with one hand and arm and moved the sieve horizontally over the surface of the iron-ware to be enameled, at the same time striking the handle with his other hand to cause the sieve to vibrate and sift the enameling powder over the

surface of the iron-ware to be enameled. The powder jetted through the sieve in intermittent puffs or waves with each blow, and this, and the physical strain and intense heat caused, in a great many instances, the unequal distribution of the powder over the surface of the ware which resulted in the enameling being wavy or rippled, uneven, or otherwise defective, and rendered the article enameled unsightly, less durable and unsaleable at a profit. The workman on account of the intense heat went through the enameling process as hurriedly as possible, with the result, in a great many instances, that the articles produced were worthless and had to be thrown away, or were so-called "seconds" and had to be sold at a price resulting in little, or no profit to the manufacturer. The process was laborious and slow and consequently more readily fusible enameling powder had to be used which resulted in a less impervious, insoluble and durable and permanently glossy surface. Furthermore, it was injurious to the health of the workmen and it was difficult to secure men physically capable of performing the work, and more difficult to train such men, as were capable, to do the work properly.

Arrott's invention, by using a mechanically operated agitator, in connection with the sieve, made possible the flowing of the enameling powder in a continuous stream, enabling the enameler to distribute the enameling powder evenly, equally and uniformly over the surface of the article to be enameled, as though the powder were a flowing thin liquid. With Arrott's invention, a workman can, by touching a valve button, secure a rapping action which is rapid, continuous and uniform. At the same time his hands are free both to sustain the load and to move the sieve over the surface and get a uniform lateral powder distribution. The blows are so rapid and regular that the powder, instead of jetting through the sieve in a puff, or distinct wave with each hand-struck blow, flows in a practically continuous, regular sheet. Arrott's invention enables the enameler to be under a much less strain in the face of terrific heat, it enables him to enamel a very much greater number of articles per hour, and the work can be done by an average man of less physical strength than was required in the former process, and he can be more easily and quickly taught to do the enameling successfully. Arrott's invention is labor and material saving and effective and, in relieving to a degree labor under fierce heat conditions, arose to the plane of the humane.

VIII.

The manufacturers of Sanitary Enameled Iron-Ware recognized the necessity of Arrott's invention to the successful manufacture of Sanitary Enameled Iron-Ware. Many of them used the invention described in the patent, or equivalent means, for enameling the iron-ware. In all cases the owner of the patent claimed that such manufacturers were infringing the patent and demanded an accounting and damages under threat of suit for infringement. Some of the manufacturers settled with the owner of the Arrott patent by paying a lump sum of money in settlement of the claim for damages and claimed to have abandoned the use of the invention. Others sought

to gain time well knowing that in the end they would have to stand suit for infringement, pay damages, abandon the use of the invention, or take a license under the patent. Others without formally taking a license, made periodical payments to the owner of the patent in order to be allowed to continue the use of the invention. Still others were sued for infringement and judgments obtained against them by the owner of the patent, which judgments were settled by the payment of a sum of money.

IX.

Prior to the defendant Wayman granting the licenses herein referred to, the Arrott patent had been sustained by the Courts in several cases.

X.

For the reasons stated, the art was in a very unsatisfactory condition. No means had been discovered of accomplishing the result produced by the use of the Arrott invention without laying the user of such means open to a suit for infringement by the owner of the Arrott patent. The manufacturers using the process in use prior to Arrott's invention were unable to successfully compete with those using the Arrott invention, and moreover, produced a disproportionate number of defective, unsightly and substantially unsaleable articles. The consumer was deceived and defrauded and the use of Sanitary Enameled Iron-Ware lessened and its reputation depreciated by defective articles being palmed off on the consumer as not defective.

XI.

The defendants had known the defendant Wayman as a manufacturer of enameled bath tubs, being connected with the Seamless Steel Bath Tub Company of Detroit, Michigan, and as Actuary of the Sanitary Enameled Iron-Ware Association, of which the defendants were members, and as such he was familiar with the needs of the trade and its condition, and knew the value of the Arrott invention.

That the defendant, Standard Sanitary Manufacturing Company, owned the Arrott patent and gave the defendant, Wayman, an option to purchase the said patent in the latter part of the year 1909, and thereafter, and within the time for which said option was given, duly assigned the said patent to the said defendant Wayman for a valuable consideration.

That the defendant, J. L. Mott Iron Works, owned the invention covered by the Ditheridge patent, and gave the defendant, Wayman, on or about the 15th day of February, 1910, an option to purchase the said invention, and thereafter, and within the time for which said option was given, duly assigned the patent to the defendant, Wayman, for a valuable consideration.

That the defendant, L. Wolff Manufacturing Company, owned the Lindsay patent, and gave the defendant, Wayman, an option on the 10th day of January, 1910, to purchase the same, and thereafter, and within the time for which said option was given, duly

assigned the said patent to the defendant, Wayman, for a valuable consideration.

That at or about the time of acquiring the said options, and thereafter, the defendant, Wayman, discussed with the defendants severally the question whether they would accept a license to use said inventions if he exercised his options and purchased said inventions.

That thereafter and during the month of March, 1910, the defendant, Wayman, called upon the defendants and presented a form of agreement, substantially the same as Exhibit 3 attached to the petition herein, upon different days and at different places, and some of the defendants, as appears from the signatures appended to the instruments, signed the same.

That thereafter, and on or about the 29th and 30th days of March, 1910, at the invitation of the defendant, Wayman, the defendants came to New York and met the defendant, Wayman, and his counsel. At said meetings a plan of a license under the various inventions covered by the Letters Patent referred to was explained in detail by Mr. Wayman and his counsel, and the legal features thereof discussed. The plan of license proposed and the terms proposed were generally acceptable to the defendants, and thereupon the defendants appointed a Committee from their number to negotiate on behalf of the manufacturers, on the one hand, with Mr. Wayman, on the other hand, as to the terms and the details of the terms upon which the said licenses could be obtained from him.

That thereafter the said Wayman prepared and presented to the several defendants proposed license agreements, proposed jobbers' license agreements, and proposed price lists, all of which were accepted by each of the defendants in the form as they now exist.

That defendants took advice of their respective counsel as to the plan as described, before accepting the said licenses, and were advised that the plan as described was covered by the Patent Laws of the United States, was entirely lawful and was not in violation of any law of the United States, or of any of the several States.

XII.

That each of the defendants fully realized the value of the use of the inventions covered by the Letters Patent referred to and that it would cause numerous economies in material, labor, time consumed, increase of output, and avoid the great loss caused by the production of defective articles. The defendants severally, therefore, readily accepted the proposition as made by Wayman as being very greatly to their benefit.

The defendants acted in entire good faith and in the belief that they were doing what they had an entire legal right to do.

That since the defendant Wayman issued the licenses referred to the defendants named in the petition herein have been and are now using the inventions covered by said Letters Patent, and as to which they are licensed, in the manufacture of Sanitary Enameled Iron-Ware. Defendants are advised by their respective counsel, and therefore aver that the said licenses are in all respects lawful,

and that in acting in accordance therewith they are not violating the laws of the United States, or of any of the several States, and particularly are not violating the Act of Congress commonly known as the Sherman Anti-Trust Act.

And the defendants deny all and all manner of unlawful combinations and confederacy wherewith they are by the said petition charged; without this, there is any other matter, cause or thing in said petition contained material or necessary for the defendants to make answer to, and not herein and hereby well and sufficiently answered, confessed, traversed, and avoided or denied, is true, to the knowledge or belief of the defendants all which matters and things the defendants are ready and willing to aver, maintain and prove as this honorable court shall direct; and humbly pray to be hence dismissed, with their reasonable costs and charges in this behalf most wrongfully sustained.

[Seal Standard Sanitary Manufacturing Company, 1899.]

STANDARD SANITARY MANFG. CO.,
By THEO. AHRENS, *President.*
THEO. AHRENS.
FRANCIS J. TORRANCE.
EDWARD L. DAWES.

[Seal L. Wolff Manufacturing Co.]

L. WOLFF MANUFACTURING CO.,
By HERMAN M. HOELSCHER, *Sec'y.*
LUDWIG WOLFF, *President.*
HERMAN M. HOELSCHER.

[Seal The J. L. Mott Iron Works.]

THE J. L. MOTT IRON WORKS.
MAX GOEBEL, *Secretary.*
MAX GOEBEL.
JORDAN L. MOTT.
W. A. MYLER.
NOBLE, JACKSON & HUBBARD,
CARROLL T. BOND, *Solicitors for Defendants.*

HERBERT NOBLE,
EDWIN E. JACKSON, JR.,
WILLIAM L. MARBURY,
Of Counsel.

STATE OF NEW YORK,
County of New York, ss:

Theodore Ahrens, being duly sworn, deposes and says: I am the President of the Standard Sanitary Manufacturing Company, one of the defendants named in the foregoing answer; I have read the foregoing answer, and am familiar with the contents thereof; the same is true of my own knowledge, except as to the matters therein

stated to be alleged upon information and belief, and as to those matters I believe it to be true.

THEO. AHRENS.

Sworn to before me this 30th day of September, 1910.

C. MACINNES,
[NOTARIAL SEAL.] *Notary Public, Kings County.*

Certificate filed in New York County.

STATE OF NEW YORK,
County of New York, ss:

Herman M. Hoelscher, being duly sworn, deposes and says: I am the Secretary of the L. Wolff Manufacturing Company, one of the defendants named in the foregoing answer; I have read the foregoing answer, and am familiar with the contents thereof; the same is true of my own knowledge, except as to the matters therein stated to be alleged upon information and belief and as to those matters I believe it to be true.

HERMAN M. HOELSCHER.

Sworn to before me this 30th day of September, 1910.

C. MACINNES,
[NOTARIAL SEAL.] *Notary Public, Kings County.*

Certificate filed in New York County.

STATE OF NEW YORK,
County of New York, ss:

Theodore Ahrens, Francis J. Torrance, and Herman M. Hoelscher, being severally duly sworn, depose and say, and each for himself deposes and says:

That he is one of the individual defendants named in the foregoing answer; that he has read the foregoing answer, and is familiar with the contents thereof; that the same is true of his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

THEO. AHRENS.
HERMAN M. HOELSCHER.
FRANCIS J. TORRANCE.

Severally sworn to before me this 30th day of September, 1910.

C. MACINNES,
[NOTARIAL SEAL.] *Notary Public, Kings County.*

Certificate filed in New York County.

STATE OF NEW YORK,
County of New York, ss:

Max Goebel, being duly sworn, deposes and says:

I am Secretary of the J. L. Mott Iron Works, one of the defendants named in the foregoing answer; I have read the foregoing answer and am familiar with the contents thereof; the same is true of my own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters I believe it to be true.

MAX GOEBEL.

Sworn to before me this 30th day of September, 1910.

[NOTARIAL SEAL.] C. MACINNES,
Notary Public, Kings County.

Certificate filed in New York County.

STATE OF NEW YORK,
County of New York, ss:

Jordan L. Mott and Max Goebel, being severally duly sworn depose and say, and each for himself deposes and says:

That he is one of the defendants named in the foregoing answer; that he has read the foregoing answer and is familiar with the contents thereof; that the same is true of his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

MAX GOEBEL.
JORDAN L. MOTT.

Severally -worn to before me this 30th day of September, 1910.

[NOTARIAL SEAL.] C. MACINNES,
Notary Public, Kings County.

Certificate filed in New York County.

STATE OF PENNSYLVANIA,
County of Allegheny, ss:

W. A. Myler and E. L. Dawes, being severally duly sworn, depose and say, and each for himself deposes and says that he is one of the individual defendants named in the foregoing answer; that he has read the same and is familiar with the contents thereof; that the same is true of his own knowledge except as to the matters therein stated to be alleged on information and belief and as to those matters he believes it to be true.

W. A. MYLER.
E. L. DAWES.

Severally sworn to before me this 1st day of October, 1910.

[NOTARIAL SEAL.] AGNES C. WAY,
Notary Public.

My commission expires January 16th, 1913.

STATE OF ILLINOIS,
County of Cook, ss:

Ludwig Wolff, being duly sworn, deposes and says: I am one of the defendants named in the foregoing answer; I have read the foregoing answer and know the contents thereof; the same is true to my own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters I believe it to be true.

LUDWIG WOLFF.

Sworn to before me this 6th day of October, 1910.
[NOTARIAL SEAL.] G. C. SCHULTZ,
Notary Public.

Answer of A. Weiskittel & Son Co. and Others.

Filed November 3rd, 1910.

In the Circuit Court of the United States for the District of Maryland.

No. —. In Equity.

UNITED STATES OF AMERICA, Petitioner,
v.
STANDARD SANITARY MANUFACTURING COMPANY and Others, Defendants.

The Joint and Several Answer of A. Weiskittel & Son Company, The Barnes Manufacturing Company, The Cahill Iron Works, Colwell Lead Company, The Day-Ward Company, The Humphreys Manufacturing Company, McVay-Walker Company, The McCrum-Howell Company, National Sanitary Manufacturing Company, Kerner Manufacturing Company, Union Sanitary Manufacturing Company, United States Sanitary Manufacturing Company, Wheeling Enameled Iron Company, Anton Weiskittel, John D. Heise, C. H. Voegele, T. R. Barnes, F. H. Caldwell, J. J. Mahoney, Jesse T. Durvea, Bert O. Tilden, W. C. Winfield, A. G. Ward, S. N. Ford, Reid Carpenter, J. A. Frauenheim, Thomas Walker, Alexander C. Walker, Lloyd G. McCrum, Howard T. Gates, Frank G. Borden, D. W. Davis, L. C. Huesman, E. V. Brigham, Charles Arrott, Jr., A. H. Cline, Jr., J. E. Wright, and George W. Franzheim, Defendants, to the Petition Herein of the United States of America, Petitioner.

The defendants severally now and at all times hereafter saving and reserving to themselves all and all manner of benefit or advantage of exception or otherwise, that can or may be had or taken to the many errors, uncertainties, insufficiencies and imperfections in the said petition contained, for answer thereto, or to so much thereof as these

defendants are advised is material and necessary for them to answer to, say:

I.

The defendants have no knowledge and have not been informed, save by the Petitioner's petition, and they cannot set forth as to their belief, or otherwise, whether the United States of America, acting under the direction of the Attorney General, brings this proceeding in equity against these defendants and the other defendants named in the petition, and of this they demand that the said petitioner shall furnish proof; and the defendants deny the allegations contained in the preamble to said petition, that these defendants and the other defendants named in the petition, or any of them, are violating the provisions of the Act of Congress passed July 2, 1890, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies." And the defendants deny that the agreements referred to in the petition are contracts, combinations or conspiracies in restraint of trade in Sanitary Enameled Iron-Ware among the several States and with foreign nations, which should either be prevented or restrained.

Defendants suggest that the allegations in the last paragraph at the bottom of page eight of the petition, as they are advised, is purely a conclusion which they need not answer, although to their silence in this behalf no admission as to the truth of such conclusion is to be imputed.

II.

The defendants suggest that the allegations in the first paragraph on page 10 of said petition that defendants are engaged in interstate and foreign trade and commerce in Sanitary Enameled Iron-Ware within the meaning of the Act of 1890, commonly known as the Sherman Anti-Trust Act, are, as they are advised, purely a conclusion although to their silence in this behalf no admission as to the truth of this conclusion is to be imputed.

Defendants have no knowledge and have not been informed, save by the petition herein, and except as so informed, defendants cannot set forth as to their belief, or otherwise, whether the only manufacturers and dealers in articles of similar character, that is Sanitary Enameled Iron-Ware, other than the defendants named in said petition are J. M. Kohler Sons Company at Sheboygan, Wis., The Iron City Sanitary Manufacturing Company of Pittsburgh, Pa., Blairsville Enameled Ware Company of Blairsville, Pa., Clymer Manufacturing Company of Indiana, Pa., Louis Lipp of Cincinnati, Ohio, and Washington Iron Works, of Los Angeles, Cal., and as to these facts, defendants demand that petitioner shall furnish proof.

Defendants have no knowledge and have not been informed, save by the petition herein, and except as so informed cannot set forth as to their belief, or otherwise, whether of the total volume of interstate and foreign trade and commerce in said products of Sanitary Enameled Iron-Ware being carried on by the defendants, and by the six manufacturers and dealers named in the foregoing paragraph, the defendants named in the petition have and control 85%, or any

similar amount, and as to these facts defendants demand that petitioner shall furnish proof.

Defendants suggest that the allegations in the last paragraph of Sub-division II, page 11 of the petition are, as they are advised, purely conclusions which they need not answer although to their silence in this behalf no admission as to the truth of such conclusions is to be imputed; but, if such allegations require an answer, defendants deny any knowledge, information or belief with respect thereto and demand that petitioner shall furnish proof.

Defendants deny that they or any of them or any of the other defendants named in the petition are, or have been, engaged in any unlawful combination or conspiracy in restraint of interstate trade or commerce, or in any unlawful attempt to monopolize the same, as described in the last paragraph of Sub-division II on page 11 of the said petition, or otherwise.

III.

Defendants deny that during the latter part of the year 1909 or early in 1910, or at any time they, or any of them, engaged in a combination or conspiracy in restraint of interstate and foreign trade and commerce in Sanitary Enameled Iron-Ware, in the manner set forth in Sub-division III of the petition, or otherwise, either among themselves or with any of the defendants named in the petition, or that since that time they, the other defendants, or any of them have been, or now are, engaged in such combination or conspiracy, or that interstate and foreign commerce has been or is now being restrained by any combination or conspiracy of the defendants among themselves, or with the other defendants, or any of them, in the manner alleged in the petition, or otherwise.

Defendants deny that by agreement either among themselves, or with the other defendants named in the petition, they have unlawfully, or at all, eliminated or suppressed competition between each other as to prices at which they are selling in interstate and foreign commerce their products in Sanitary Enameled Iron-Ware, or that they have unlawfully, or at all, fixed or established, or are now maintaining uniform prices and terms of sale to their respective customers.

The defendants deny that the discounts which the defendants named in the petition quote and allow to jobbers in carrying on such commerce are arrived at by agreement between the defendants among themselves, or that each defendant quotes and allows such discounts only as agreed upon, known to and accepted by the other defendants named in the petition.

Defendants aver that each of the corporation defendants here answering has separately taken a license from the defendant, Edwin L. Wayman, under Letters Patent of the United States No. 633,941, issued September 26, 1899, to James W. Arrott, Jr., for a dredger for pulverulent material, No. 949,625, issued February 15, 1910, to E. Ditheridge for a pneumatic sieve, and No. 939,918, issued November 9, 1909, to William Lindsay for an enameling powder distributer, which licenses are similar to Exhibit 8 attached to the petition, and that licensed Sanitary Enamel Iron-Ware is sold by

the defendants to jobbers under agreements similar to Exhibit 9 attached to the petition, but the defendants beg leave, upon the hearing of this cause, to refer to the originals of said licenses and said Jobbers' License Agreement for greater particularity And, except as herein admitted, the defendants deny the allegations contained in the two full paragraphs on page 12 of the petition.

Defendants deny that the combination alleged in the paragraph commencing at the bottom of page 12 of the petition exists, or that the result of the alleged combination is that throughout the United States all purchasers and users of the aforesaid products of Sanitary Enameled Iron-Ware are obliged to pay the same prices, or that such prices have been or are now fixed by the defendants named in the petition by mutual agreement, or otherwise, without competition with each other or otherwise.

Defendants deny that they, or any of them, have devised means by which each of them is advised of the amount of output of each of the other defendants named in the petition in order that thereby they may, by agreement, limit and restrict respective outputs as may seem advisable; and aver that they do not derive, under the terms of the licenses, knowledge of the output of any of the defendants named in the petition, and aver that at no time is any information so gained for the purpose of limiting and restricting their respective outputs.

Defendants deny that they have divided the United States into certain territorial or geographical zones, and they further deny that by the alleged system of dividing the United States into zones, or any other system of contracts, jobbers are restricted in making sales to the zone in which such jobber is located. They deny that there is any arrangement whereby the jobber is not allowed to sell outside of his alleged zone. They deny that the manufacturers have adopted the feature alleged, or any other unlawful feature, to restrict the competition between jobbers and to enable them to hold the jobbers firmly to the alleged selling arrangement and to the resale prices fixed by the combination, the existence of which alleged selling arrangement and said alleged combination defendants deny; and defendants aver that the defendant, Wayman, has separately licensed the several defendant corporations upon terms more fully set forth in said licenses and Jobbers' License Agreements, to the originals of which for greater particularity the defendants beg leave to refer upon the hearing of this cause; except as stated, the defendants deny all the allegations in said second paragraph on page 13 of the petition.

The defendants deny that among themselves or by agreement with the other defendants named in the petition, or otherwise, they have largely and unreasonably increased the prices at which they sell their products to jobbers; defendants deny that the defendants have more particularly advanced the re-sale prices of jobbers by their alleged system of contracts controlling re-sale prices, and aver that there is no agreement among the defendants named in the petition, or any of them, as alleged.

The defendants deny that the defendants named in the petition

or any of them, are co-operating in fighting the manufacturers of Sanitary Enameled Iron-Ware, or dealers therein, in interstate commerce who have not become parties to the alleged combination, and deny the existence of the alleged combination; and the defendants further deny that all of the defendants, or any of them, have united or are engaged in a common effort to force the said manufacturers or dealers into the alleged combination, or to drive them out of business.

Defendants deny the other allegations in said paragraph contained and aver that the terms upon which the several manufacturers sell to jobbers are fixed in the licenses which the defendant, Wayman, has given, to the originals of which for greater particularity the defendants beg leave to refer upon the hearing of this cause.

Defendants deny that they, or any of the defendants named in the petition, have been establishing and enforcing a system of severe penalties which are imposed upon such members of the alleged combination as depart from the alleged rules respecting prices and terms fixed by the alleged combination, and deny that there is any combination among the defendants, or any of them. Defendants deny each and every other allegation in the first full paragraph of said petition on page 14, and aver that the full terms upon which the several manufacturers, defendants herein, are licensed, are set forth in the licenses above referred to, to the originals of which for greater particularity the defendants beg leave to refer upon the hearing of this cause.

IV.

Defendants deny that the defendants named in the petition, or any of them, have entered into any combination of the character described in the petition, or otherwise, and further deny each and every other allegation in said first paragraph of Sub-division IV; and aver that the licenses which the defendant, Wayman, has given to the various licensees have been given by the defendant, Wayman, and accepted by the defendants in good faith and upon the advice of counsel to the effect that such licenses were based upon the patent laws of the United States and that defendants are advised and believe the same to be lawful, and defendants are informed that the other defendants named in the petition herein have been similarly advised and entertain similar beliefs.

Defendants deny the alleged conditional assignment of the three patents, or any of them, referred to in the said petition in paragraph 2 of Sub-division IV., or that the defendant, Wayman, was selected as the assignee thereof by agreement of the defendants or any of them, or any of the defendants named in the petition, and defendants deny each and every of the other allegations in said paragraph contained.

Defendants aver that the defendant Wayman is the owner of the three patents specified in the full paragraph on page 15 of the petition, and that he purchased same from certain of the defendants named in the petition pursuant to, as defendants are informed and believe, certain several options.

And defendants further aver that the contracts under which said defendant Wayman purchased the said patents are, as defendants are informed and believe, in writing, to the originals of which for greater particularity the defendants beg leave to refer on the trial of this cause.

Except as averred the defendants deny that the said purchases were made as the result of any agreement between the defendant Wayman and these answering defendants, or any of them, or any of the defendants named in the petition; and further deny, except as herein stated, each and every allegation in said full paragraph on page 15 contained.

Defendants admit that prior to the granting of the licenses by defendant, Wayman, to the various defendants named in the petition, certain of them had manufactured their product without the use of the inventions covered by such patents, and the defendants admit that the inventions covered by the said Letters Patent are useful and valuable in the manufacture of Sanitary Enameled Ironware; but defendants deny each and every other allegation in the first full paragraph on page 16 of the petition contained.

Defendants deny that before the assignments to the defendant, Wayman, of the Letters Patent referred to were made they had agreed either with him, or among themselves, or with any of the defendants named in the petition, upon all the essential features of the licensing agreement. Defendants deny any agreement among themselves, or with the other defendants named in the petition, or any of them, whereby defendant, Wayman, was to become the ostensible licensor, or that he was the ostensible licensor, and deny that a price list had been agreed upon between defendant, Wayman, and these defendants, or among themselves, or with any of the other defendants named in the petition, and they deny each and every other allegation in said paragraph contained, and aver that there was no agreement among the manufacturers and aver that before any agreement had been made with any manufacturer defendant Wayman had secured an option for the purchase of Arrott and other patents.

Defendants admit that Exhibits 8, 9 and 10 respectively, attached to the petition, are generally correct copies of the manufacturers' license agreement, the jobbers' license agreement, and a part of the price list, but for greater particularity beg leave to refer to the originals thereof upon the trial of this action.

Defendants deny that Exhibits 1 to 7, attached to the petition, evidence the manner in which the license arrangement was arrived at; that Exhibits 11 to 17, attached to the petition, illustrate the methods of the defendants and the effect of the combination upon independent manufacturers and jobbers who have not signed the license agreements, and beg leave upon the trial hereof to refer to the originals of said exhibits for greater particularity.

Defendants deny that all the terms and conditions of the contracts and agreements which together make up the alleged licensing arrangement had been agreed upon by all the defendants, or any of them, prior to the assignment of the patents to the defendant Way-

man. The defendants deny that each defendant stipulated, as a condition precedent to his executing the license agreement, that all the others should execute a similar agreement. Defendants deny the allegation that no defendant would have executed the agreement unless he had been certain that all of the other defendants would execute it. Defendants deny that the agreement on the part of all of the defendants to enter into the license arrangement was a condition precedent to the assignment of the patents to defendant Wayman, and defendants deny the existence of any agreement on the part of all the defendants, or any of them, to enter into the license agreement as a condition precedent to the assignment to defendant Wayman. Defendants deny the allegation that there would not have been an assignment to the defendant Wayman, or that no license agreement with any of the defendants would have been arrived at if all the corporation defendants had not agreed to go into the alleged scheme. Defendants deny the allegation in the petition that all the parties to the alleged arrangement were not seeking the use of a valid and essential patent necessary in the carrying on of their business, and defendants further deny that they were engaged in a price fixing plan to wrongfully and unlawfully eliminate competition; and deny each and every other allegation in said paragraph on pages 17 and 18 of the petition contained.

V.

Defendants deny each and every allegation in Subdivision V of the petition contained.

VI.

Defendants deny all the allegations contained in Sub-division VI. of the petition, except that they admit that the defendants A. Weiskittel & Son Company, Anton Weiskittel and John D. Heise are located and doing business within the State and District of Maryland, and that said individual defendants reside therein.

Furthermore, and for a more complete answer, the defendants say:

VII.

That prior to the invention of James W. Arrott, Jr., covered by Letters Patent of the United States No. 633,941, issued September 26, 1899, to said Arrott for enameling sanitary enameled iron-ware, Sanitary Enameled Iron-Ware was enameled by a hand process. This process consisted generally of sifting over the surface of the Iron-Ware, when heated to a red heat, the enameling powder. Enameling powder is supposed and intended to consist of such materials as when fused to form on the iron to be enameled a hard, impenetrable, insoluble, smooth and glossy surface. A sieve containing a quantity of the powder was attached to the end of a handle. The workman held the handle of the sieve with one hand and arm and moved the sieve horizontally over the surface of the iron-ware to be enameled,

at the same time striking the handle with his other hand to cause the sieve to vibrate and sift the enameling powder over the surface of the iron-ware to be enameled. The powder jetted through the sieve in intermittent puffs or waves with each blow, and this, and the physical strain and intense heat caused, in a great many instances, the unequal distribution of the powder over the surface of the ware, which resulted in the enameling being wavy or rippled, uneven, or otherwise defective, and rendered the article enameled unsightly, less durable and unsalable at a profit. The workman on account of the intense heat went through the enameling process as hurriedly as possible, with the result, in a great many instances, that the articles produced were worthless and had to be thrown away, or were so-called "seconds" and had to be sold at a price resulting in little, or no profit to the manufacturer. The process was laborious and slow and consequently more readily fusible enameling powder had to be used which resulted in a less impervious, insoluble and durable and permanently glossy surface. Furthermore, it was injurious to the health of the workmen and it was difficult to secure men physically capable of performing the work, and more difficult to train such men, as were capable, to do the work properly.

Arrot's invention, by using a mechanically operated agitator, in connection with the sieve, made possible the flowing of the enameling powder in a continuous stream, enabling the enameler to distribute the enameling powder evenly, equally and uniformly over the surface of the article to be enameled, as though the powder were a flowing thin liquid. With Arrott's invention, a workman can, by touching a valve button, secure a rapping action which is rapid, continuous and uniform. At the same time his hands are free both to sustain the load and to move the sieve over the surface and get a uniform lateral powder distribution. The blows are so rapid and regular, that the powder, instead of jetting through the sieve in a puff or distinct wave with each hand-struck blow, flows in a practically continuous regular sheet. Arrott's invention enables the enameler to be under a much less strain in the face of terrific heat, it enables him to enamel a very much greater number of articles per hour, and the work can be done by an average man of less physical strength than was required in the former process, and he can be more easily and quickly taught to do the enameling successfully. Arrott's invention is labor and material saving, and effective, and, in relieving to a degree labor under fierce heat conditions, arose to the plane of the humane.

VIII.

The manufacturers of Sanitary Enameled Iron-Ware recognized the necessity of Arrott's invention to the successful manufacture of Sanitary Enameled Iron-Ware. Many of them used the invention described in the patent, or equivalent means, for enameling the iron-ware. In all cases the owner of the patent claimed that such manufacturers were infringing the patent and demanded an accounting and damages under threat of suit for infringement. Some of the manufacturers settled with the owner of the

Arrott patent by paying a lump sum of money in settlement of the claim for damages and claimed to have abandoned the use of the invention. Others sought to gain time well knowing that in the end they would have to stand suit for infringement, pay damages, abandon the use of the invention, or take a license under the patent. Others without formally taking a license, made periodical payments to the owner of the patent in order to be allowed to continue the use of the invention. Still others were sued for infringement and judgments obtained against them by the owner of the patent, which judgments were settled by the payment of a sum of money.

IX.

Prior to the defendant Wayman granting the licenses herein referred to, the Arrott patent had been sustained by the Courts in several cases.

X.

For the reasons stated, the art was in a very unsatisfactory condition. No means had been discovered of accomplishing the result produced by the use of the Arrott invention without laying the user of such means open to a suit for infringement by the owner of the Arrott patent. The manufacturers using the process in use prior to Arrott's invention were unable to successfully compete with those using the Arrott invention, and moreover, produced a disproportionate number of defective, unsightly and substantially unsaleable articles. The consumer was deceived and defrauded and the use of Sanitary Enameled Iron-Ware lessened and its reputation depreciated by defective articles being palmed off on the consumer as not defective.

XI.

The defendants had known the defendant Wayman as a manufacturer of enameled bath tubs, being connected with the Seamless Steel Bath Tub Company of Detroit, Michigan, and as Actuary of the Sanitary Enameled Iron-Ware Association, of which the defendants were members, and as such he was familiar with the needs of the trade and its condition, and knew the value of the Arrott invention.

That after the said Wayman had secured an option upon the invention covered by the Arrott and other patents, he discussed with the defendants the question whether they would accept a license to use said inventions, if he exercised his options and purchased said inventions.

That thereafter and during the month of March 1910 the defendant Wayman called upon the defendants and presented a form of agreement, substantially the same as Exhibit 3 attached to the petition herein, upon different days and at different places, and some of the defendants, as appears from the signatures appended to the instrument, signed the same.

That thereafter and on or about the 29th and 30th days of March 1910, at the invitation of the defendant Wayman, the defendants came to New York and met the defendant Wayman and his counsel At said meetings a plan of a license under the various inventions covered by the Letters Patent referred to was explained in detail by Mr. Wayman and his counsel, and the legal feature thereof discussed The plan of license proposed and the terms proposed were generally acceptable to the defendants, and thereupon the defendants appointed a Committee from their number to negotiate on behalf of the manufacturers, on the one hand, with Mr. Wayman, on the other hand, as to the terms and the details of the terms upon which the said licenses could be obtained from him.

That thereafter the said Wayman prepared and presented to the several defendants proposed license agreements, proposed jobbers' license agreements, and proposed price lists, all of which were accepted by each of the defendants in the form as they now exist.

That defendants took advice of their respective counsel as to the plan as described, before accepting the said licenses, and were advised that the plan as described was covered by the Patent Laws of the United States, was entirely lawful and was not in violation of any law of the United States, or of any of the several States.

XII.

That each of the defendants fully realized the value of the use of the inventions covered by the Letters Patent referred to and that it would cause numerous economies in material, labor, time consumed, increase of output, and avoid the great loss caused by the production of defective articles. The defendants severally, therefore, readily accepted the proposition as made by Wayman as being very greatly to their benefit.

The defendants acted in entire good faith and in the belief that they were doing what they had an entire legal right to do.

That since the defendant Wayman issued the licenses referred to the defendants named in the petition herein have been and are now using the inventions covered by said Letters Patent, and as to which they are licensed, in the manufacture of Sanitary Enameled Iron-Ware. Defendants are advised by their respective counsel, and therefore aver that the said licenses are in all respects lawful, and that in acting in accordance therewith they are not violating the laws of the United States, or of any of the several States, and particularly are not violating the Act of Congress commonly known as the Sherman Anti-Trust Act.

And the defendants deny all and all manner of unlawful combination and confederacy wherewith they are by the said petition charged: without this, there is any other matter, cause or thing in said petition contained material or necessary for the defendants to make answer to, and not herein and hereby well and sufficiently answered, confessed, traversed, and avoided or denied, is true, to the knowledge or belief of the defendants, all which matters and things the defendants are ready and willing to aver, maintain and prove as this honorable court shall direct; and humbly pray to be hence dis-

missed, with their reasonable costs and charges in this behalf most wrongfully sustained.

A. WEISKITTEL & SON CO.,
By ANTON WEISKITTEL, *Pres.*
JOHN D. HEISE.
ANTON WEISKITTEL.
UNITED STATES SANITARY MFG. CO.
A. H. CLINE, JR., *Sec'y.*
A. H. CLINE, JR.
THE BARNES MFG. CO.
T. R. BARNES, *S'c'y & Gen. M'g'r.*
T. R. BARNES.
THE McCRUM HOWELL CO.
LLOYD G. McCRUM, *Pres't.*
LLOYD G. McCRUM.
HOWARD T. GATES.
NATIONAL SANITARY MFG. CO.
F. G. BORDEN, *Pres.*
F. G. BORDEN.
THE DAY WARD CO.,
By A. G. WARD, *V. P.*
A. G. WARD.
UNION SANITARY MFG. CO.
E. V. BRIGHAM, *Sec'y & Treas.*
E. V. BRIGHAM.
KERNER MFG. CO.
CARL FALK, *Vice Pres't.*
THE CAHILL IRON WORKS.
JOHN J. MAHONEY, *V. P. & Sec.*
JOHN J. MAHONEY.
F. H. CALDWELL.
COLWELL LEAD CO.
J. T. DURYEA, *Pres.*
J. T. DURYEA.
B. O. TILDEN.
THE HUMPHRYES MFG. CO.,
By REID CARPENTER, *Secretary.*
S. N. FORD, *Pres't.*
REID CARPENTER.
C. H. VOEGELE.
J. A. FRAUENHEIM.
W. C. WINFIELD.
CHARLES ARROTT.
L. C. HUESMANN.
D. W. DAVIS.
WHEELING ENAMELED IRON CO.,
By J. E. WRIGHT, *Pres't.*
J. E. WRIGHT.
GEORGE W. FRANZHEIM.
McVAY WALKER CO.,
By THOS. WALKER, *Pres't.*

THOS. WALKER.
ALEX. C. WALKER.
NOBLE, JACKSON & HUBBARD,
CARROLL T. BOND.
Solicitors for Defendants.

HERBERT NOBLE,
EDWIN E. JACKSON, JR.,
WILLIAM L. MARBURY,
Of Counsel.

STATE OF NEW YORK,
County of New York, ss:

Anton Weiskittel, being duly sworn, deposes and says:
I am the President of A. Weiskittel & Son Co., one of the defendants named in the foregoing answer; I have read the foregoing answer and am familiar with the contents thereof; the same is true of my own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters I believe it to be true.

ANTON WEISKITTEL.

Sworn to before me this 30th day of September, 1910.

[NOTARIAL SEAL.] C. MACINNES,
Notary Public, Kings County.

Certificate filed in New York County.

STATE OF NEW YORK,
County of New York, ss:

T. R. Barnes, being duly sworn, deposes and says:
I am the Secretary of The Barnes Manufacturing Company, one of the defendants named in the foregoing answer; I have read the foregoing answer and am familiar with the contents thereof; the same is true of my own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters I believe it to be true.

T. R. BARNES.

Sworn to before me this 30th day of September, 1910.

[NOTARIAL SEAL.] C. MACINNES,
Notary Public, Kings County.

Certificate filed in New York County.

STATE OF NEW YORK,
County of New York, ss:

J. J. Mahoney, being duly sworn, deposes and says:
I am the Vice-President of The Cahill Iron Works, one of the defendants named in the foregoing answer; I have read the foregoing answer and am familiar with the contents thereof; the same is true of my own knowledge, except as to the matters therein stated to be al-

leged upon information and belief, and as to those matters I believe it to be true.

JOHN J. MAHONEY.

Sworn to before me this 30th day of September, 1910.

[NOTARIAL SEAL.] C. MACINNES,
Notary Public, Kings County.

Certificate filed in New York County.

STATE OF NEW YORK,
County of New York, ss:

Jesse T. Duryea, being duly sworn, deposes and says:

I am the President of Colwell Lead Company, one of the defendants named in the foregoing answer; I have read the foregoing answer and am familiar with the contents thereof; the same is true of my own knowledge except as to the matters therein stated to be alleged upon information and belief, and as to those matters I believe it to be true.

JESSE T. DURYEA.

Sworn to before me this 30th day of September, 1910.

[NOTARIAL SEAL.] C. MACINNES,
Notary Public, Kings County.

Certificate filed in New York County.

STATE OF NEW YORK,
County of New York, ss:

A. G. Ward, being duly sworn, deposes and says:

I am the Vice-President of the Dov-Ward Company, one of the defendants named in the foregoing answer; I have read the foregoing answer and am familiar with the contents thereof; the same is true of my own knowledge except as to the matters therein stated to be alleged upon information and belief, and as to those matters I believe it to be true.

A. G. WARD, *V. P.*

Sworn to before me this 30th day of September, 1910.

[NOTARIAL SEAL.] C. MACINNES,
Notary Public, Kings County.

Certificate filed in New York County.

STATE OF NEW YORK,
County of New York, ss:

Lloyd G. McCrum, being duly sworn, deposes and says:

I am the President of the McCrum-Howell Company, one of the defendants named in the foregoing answer; I have read the foregoing answer and am familiar with the contents thereof; the same is true of my own knowledge except as to the matters therein stated to be al-

leged upon information and belief, and as to those matters I believe it — be true.

LLOYD G. McCRUM.

Sworn to before me this 30th day of September, 1910.

[NOTARIAL SEAL.] C. MacINNES,
Notary Public, Kings County.

Certificate filed in New York County.

STATE OF NEW YORK,
County of New York, ss:

Frank G. Borden, being duly sworn, deposes and says:

I am the President of the National Sanitary Manufacturing Company, one of the defendants named in the foregoing answer; I have read the foregoing answer and am familiar with the contents thereof; the same is true of my own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters I believe it to be true.

F. G. BORDEN.

Sworn to before me this 30th day of September, 1910.

[NOTARIAL SEAL.] C. MacINNES,
Notary Public, Kings County.

Certificate filed in New York County.

STATE OF NEW YORK,
County of New York, ss:

E. V. Brigham, being duly sworn, deposes and says:

I am the Secretary of Union Sanitary Manufacturing Company, one of the defendants named in the foregoing answer; I have read the foregoing answer and am familiar with the contents thereof; the same is true of my own knowledge except as to the matters therein stated to be alleged upon information and belief, and as to those matters I believe it to be true.

E. V. BRIGHAM.

Sworn to before me this 30th day of September, 1910.

[NOTARIAL SEAL.] C. MacINNES,
Notary Public, Kings County.

Certificate filed in New York County.

STATE OF NEW YORK,
County of New York, ss:

A. H. Cline, Jr., being duly sworn, deposes and says:

I am the Secretary of United States Sanitary Manufacturing Company, one of the defendants named in the foregoing answer; I have read the foregoing answer and am familiar with the contents thereof; the same is true of my own knowledge, except as to the matters

therein stated to be alleged upon information and belief, and as to those matters I believe it to be true.

A. H. CLINE, Jr.

Sworn to before me this 30th day of September, 1910.

[NOTARIAL SEAL.] C. MacINNES,
Notary Public, Kings County.

Certificate filed in New York County.

STATE OF NEW YORK,
County of New York, ss:

Carl Falk, being duly sworn, deposes and says: I am Vice-President of the Kerner Manufacturing Company, one of the defendants named in the foregoing answer; I have read the foregoing answer and am familiar with the contents thereof; the same is true of my own knowledge except as to the matters herein stated to be alleged upon information and belief, and as to those matters I believe it to be true.

CARL FALK.

Sworn to before me this 30th day of September, 1910.

[NOTARIAL SEAL.] C. MacINNES,
Notary Public, Kings County.

Certificate filed in New York County.

STATE OF NEW YORK,
County of New York, ss:

Anton Weiskittel, T. R. Barnes, J. J. Mahoney, Jesse T. Duryea, A. G. Ward, Lloyd G. McCrum, Howard T. Gates, Frank G. Borden, E. V. Brigham and A. H. Cline, Jr., Bert O. Tilden, being severally duly sworn depose and say, and each for himself deposes and says, that he is one of the defendants named in the foregoing answer; that he has read the foregoing answer and is familiar with the contents thereof; that the same is true of his own knowledge except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

ANTON WEISKITTEL.
JOHN J. MAHONEY.
LLOYD G. McCRUM.
JESSE T. DURYEA.
A. G. WARD.
T. R. BARNES.
A. H. CLINE, Jr.
F. G. BORDEN.
HOWARD T. GATES.
E. V. BRIGHAM.
BERT O. TILDEN.

Severally sworn to before me this 30th day of September, 1910.
[NOTARIAL SEAL.] C. MACINNES,
Notary Public, Kings County.

Certificate filed in New York County.

STATE OF PENNSYLVANIA,
County of Allegheny, ss:

Reid Carpenter, being duly sworn, deposes and says:
I am Secretary of the Humphryes Manufacturing Company, one of the defendants named in the foregoing answer; I have read the foregoing answer and am familiar with the contents thereof; the same is true of my own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters I believe it to be true.

REID CARPENTER.

Sworn to before me this 1st day of October, 1910.
[NOTARIAL SEAL.] AGNES C. WAY,
Notary Public.

My Commission Expires January 16th, 1913.

STATE OF PENNSYLVANIA,
County of Allegheny, ss:

Reid Carpenter, being duly sworn, deposes and says:
That he is one of the defendants named in the foregoing answer; that he has read the foregoing answer and is familiar with the contents thereof; that the same is true of his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

REID CARPENTER.

Sworn to before me this 1st day of October, 1910.
[NOTARIAL SEAL.] AGNES C. WAY,
Notary Public.

My Commission Expires January 16th, 1913.

STATE OF PENNSYLVANIA,
County of Allegheny, ss:

C. H. Voegele, being duly sworn, deposes and says: I am one of the defendants named in the foregoing answer; I have read the foregoing answer and know the contents thereof, and the same is true to my own knowledge, except as to the matters therein stated to be alleged upon information and belief and as to those matters I believe it to be true.

C. H. VOEGELE.

Sworn to before me this 1st day of October, 1910.
[NOTARIAL SEAL.] AGNES C. WAY,
Notary Public.

My Commission Expires January 16th, 1913.

STATE OF PENNSYLVANIA,
County of Allegheny, ss:

J. A. Frauenheim, being duly sworn, deposes and says: I am one of the defendants named in the foregoing answer; I have read the foregoing answer and am familiar with the contents thereof; and the same is true to my own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters I believe it to be true.

J. A. FRAUENHEIM.

Sworn to before me this 1st day of October, 1910.

[NOTARIAL SEAL.] AGNES C. WAY,
Notary Public.

My Commission Expires January 16th, 1913.

STATE OF PENNSYLVANIA,
County of Allegheny, ss:

W. C. Winfield, being duly sworn, deposes and says: I am one of the defendants named in the foregoing answer; I have read the foregoing answer and know the contents thereof, and the same is true to my own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters I believe it to be true.

W. C. WINFIELD.

Sworn to before me this 1st day of October, 1910.

[NOTARIAL SEAL.] AGNES C. WAY,
Notary Public.

My Commission Expires January 16th, 1913.

STATE OF PENNSYLVANIA,
County of Allegheny, ss:

Charles Arrott, being duly sworn, deposes and says: I am one of the defendants named in the foregoing answer; I have read the foregoing answer and know the contents thereof, and the same is true to my own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters I believe it to be true.

CHARLES ARROTT.

Sworn to before me this 1st day of October, 1910.

[NOTARIAL SEAL.] AGNES C. WAY,
Notary Public.

My Commission Expires January 16th, 1913.

STATE OF PENNSYLVANIA,
County of Allegheny, ss:

L. C. Huesman, being duly sworn, deposes and says: I am one of the defendants named in the foregoing answer; I have read the foregoing answer and am familiar with the contents thereof; the same is true to my own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters I believe it to be true.

L. C. HUESMANN.

Sworn to before me this 1st day of October, 1910.
[NOTARIAL SEAL.] AGNES C. WAY,
Notary Public.
My Commission Expires January 16th, 1913.

STATE OF PENNSYLVANIA,
County of Allegheny, ss:

D. W. Davis, being duly sworn, deposes and says: I am one of the defendants named in the foregoing answer; I have read the foregoing answer and know the contents thereof, and the same is true to my own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters I believe it to be true.

D. W. DAVIS.

Sworn to before me this 1st day of October, 1910.
[NOTARIAL SEAL.] AGNES C. WAY,
Notary Public.
My Commission Expires January 16th, 1913.

STATE OF PENNSYLVANIA,
County of Allegheny, ss:

J. E. Wright, being duly sworn, deposes and says:
I am President of Wheeling Enameled Iron Company, one of the defendants named in the foregoing answer; I have read the foregoing answer and am familiar with the contents thereof; the same is true of my own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters I believe it to be true.

J. E. WRIGHT.

Sworn to before me this 1st day of October, 1910.
[NOTARIAL SEAL.] AGNES C. WAY,
Notary Public.
My Commission Expires January 16th, 1913.

STATE OF PENNSYLVANIA,
County of Allegheny, ss:

J. E. Wright and George W. Franzheim, being severally duly sworn, deposes and say, and each for himself deposes and says:

That he is one of the defendants named in the foregoing answer; that he has read the foregoing answer and is familiar with the contents thereof; that the same is true of his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

J. E. WRIGHT.
GEORGE W. FRANZHEIM.

Severally sworn to before me this the 1st day of October, 1910.

[NOTARIAL SEAL.] AGNES C. WAY,
Notary Public.

My Commission Expires January 16th, 1913.

STATE OF PENNSYLVANIA,
County of Allegheny, ss:

Thomas Walker, being duly sworn, deposes and says:

I am President of McVay-Walker Company, one of the defendants named in the foregoing answer; I have read the foregoing answer and know the contents thereof; the same is true of my own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters I believe it to be true.

THOS. WALKER.

Sworn to before me this 1st day of October, 1910.

[NOTARIAL SEAL.] AGNES C. WAY,
Notary Public.

My Commission Expires January 16th, 1913.

STATE OF PENNSYLVANIA,
County of Allegheny, ss:

Thomas Walker, being duly sworn, deposes and says:

That he is one of the defendants named in the foregoing answer; that he has read the foregoing answer and knows the contents thereof; that the same is true of his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

THOS. WALKER.

Sworn to before me this 1st day of October, 1910.

[NOTARIAL SEAL.] AGNES C. WAY,
Notary Public.

My Commission Expires January 16th, 1913.

UNITED STATES OF AMERICA,
District of Maryland, ss:

John D. Heise, being duly sworn, deposes and says: I am one of the defendants named in the foregoing answer; I have read the foregoing answer and am familiar with the contents thereof; the same is true to my own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters I believe it to be true.

JOHN D. HEISE.

Sworn to before me this 11th day of February, 1911.

[Seal of Court.]

ARTHUR L. SPAMER,
Clerk U. S. Circuit Court for the District of Maryland.

STATE OF TENNESSEE,
County of Hamilton, ss:

F. H. Caldwell, being duly sworn, deposes and says: I am one of the defendants named in the foregoing answer; I have read the foregoing answer and am familiar with the contents thereof; the same is true to my own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters I believe it to be true.

F. H. CALDWELL.

Sworn to before me this 6th day of Oct., 1910.

[NOTARIAL SEAL.] C. W. K. MEACHAM,
Notary Public.

STATE OF PENNSYLVANIA,
County of Allegheny, ss:

Alexander C. Walker, being duly sworn, deposes and says:
I am one of the defendants named in the foregoing answer; I have read the foregoing answer and am familiar with the contents thereof; the same is true to my own knowledge except as to the matters therein stated to be alleged upon information and belief, and as to those matters I believe it to be true.

ALEX. C. WALKER.

Sworn to before me this 14th day of October, 1910.

[NOTARIAL SEAL.] AGNES C. WAY,
Notary Public.

My Commission Expires January 16th, 1913.

STATE OF OHIO,
County of Richland, ss:

S. N. Ford, being duly sworn, deposes and says: I am one of the defendants named in the foregoing answer; I have read the fore-

going answer and am familiar with the contents thereof; the same is true to my own knowledge except as to the matters therein stated to be alleged upon information and belief, and as to those matters I believe it to be true.

[CORPORATE SEAL.] S. N. FORD.

Sworn to before me this — day of October, 1910.

[NOTARIAL SEAL.] HARRY DE YARMON,
Notary Public.

My Commission expires July 15th, 1911.

Separate Answer of Colwell Lead Company, Jesse T. Duryea and Bert O. Tilden.

Filed February 11, 1911.

In the Circuit Court of the United States for the District of Maryland.

UNITED STATES OF AMERICA
v.
STANDARD SANITARY MANUFACTURING COMPANY et al.

In Equity.

Order Granting Leave to File Amended or Supplemental Answer of Colwell Lead Company, Jesse T. Duryea and Bert O. Tilden.

Upon application of solicitors for the defendants Colwell Lead Company, Jesse T. Duryea and Bert O. Tilden, and upon the written consent of solicitors for the petitioner, leave is hereby granted to the said defendants Colwell Lead Company, Jesse T. Duryea and Bert O. Tilden to file in this proceeding their joint and several amended or supplemental answer to the petition, which answer is hereto attached.

JOHN C. ROSE, *Judge.*

The petitioner consents to the passage of the above order granting leave to the defendants Colwell Lead Company, Jesse T. Duryea and Bert O. Tilden to file the attached answer.

JOHN PHILIP HILL,
U. S. Attorney.
EDWIN P. GROSVENOR,
Spec. Ass't to Att'y Gen'l.

In the Circuit Court of the United States for the District of Maryland.

No. —. In Equity.

UNITED STATES OF AMERICA, Petitioner,
against
STANDARD SANITARY MANUFACTURING COMPANY and Others, Defendants.

The Joint and Several Answer of the Colwell Lead Company, Jesse T. Duryea and Bert O. Tilden, Defendants, to the Petition Herein of the United States of America, Petitioner.

These defendants severally now and at all times hereafter saving and reserving to themselves all and all manner of benefit or advantage of exception or otherwise, that can or may be had or taken to the many errors, uncertainties, insufficiencies and imperfections in the said petition contained, for answer thereto, or to so much thereof as these defendants are advised is material and necessary for them to answer to, say:

I.

These defendants have no knowledge and have not been informed, save by the Petitioner's petition, and they cannot set forth as to their belief, or otherwise, whether the United States of America, acting under the direction of the Attorney General, brings this proceeding in equity against these defendants and the other defendants named in the petition, and of this they demand that the said petitioner shall furnish proof; and these defendants deny the allegations contained in the preamble to said petition, that these defendants and the other defendants named in the petition, or any of them, are violating the provisions of the Act of Congress passed July 2, 1890, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies." And these defendants deny that the agreements referred to in the petition are contracts, combinations or conspiracies in restraint of trade in Sanitary Enameled Iron-Ware among the several States and with foreign nations, which should either be prevented or restrained.

These defendants deny that the defendant Bert O. Tilden participates in the management and direction of the business of the Colwell Lead Company, but on the contrary allege his personal time and attention is devoted to the business of the American Sanitary Company, a corporation of which the said Bert O. Tilden is President, and these defendants allege that the duties of the said Bert O. Tilden as Secretary of the Colwell Lead Company are purely nominal, except as hereinbefore alleged.

These defendants suggest that the allegation in the last paragraph at the bottom of page eight of the petition, as they are advised, is purely a conclusion which they need not answer, although to their

silence in this behalf no admission as to the truth of such conclusion is to be imputed.

II.

These defendants deny that they now are or they at any time have been engaged in selling and shipping Enameled Iron-Ware into States of the United States, or in selling or shipping the same to foreign countries; and these defendants deny that they have any agents in different parts of the United States who solicit orders for their product, or that they ship any such Enameled Iron-Ware pursuant to such orders from the factory of the Colwell Lead Company to any customers located in other States; and these defendants deny that they are engaged in Interstate or foreign trade or commerce in Enameled Iron-Ware within the meaning of the Act of Congress in said petition referred to, but on the contrary these defendants allege that they manufacture at Elizabeth, New Jersey, Enameled Iron-Ware solely for the use of the Colwell Lead Company; that the manufactured product is shipped from said factory to the warerooms of the Colwell Lead Company in the City of New York and is there sold by the said Colwell Lead Company locally to plumbers, plumbing contractors and the public generally.

These defendants have no knowledge and have not been informed, save by the petition herein, and except as so informed, defendants cannot set forth as to their belief, or otherwise, whether the only manufacturers and dealers in articles of similar character, that is Sanitary Enameled Iron-Ware, other than the defendants named in said petition are J. M. Kohler Sons Company at Sheboygan, Wis., The Iron City Sanitary Manufacturing Company of Pittsburgh, Pa., Blairsville Enameled Ware Company of Blairsville, Pa., Clymer Manufacturing Comp- of Indiana, Pa., Louis Lipp of Cincinnati, Ohio, and Washington Iron Works of Los Angeles, Cal., and as to these facts, these defendants demand that petitioner shall furnish proof.

Defendants have no knowledge and have not been informed, save by the petition herein, and except as so informed cannot set forth as to their belief, or otherwise, whether of the total volume of interstate and foreign trade and commerce in said products of Sanitary Enameled Iron-Ware being carried on by the defendants, and by the six manufacturers and dealers named in the foregoing paragraph, the defendants named in the petition have and control 85% or any similar amount, and as to these facts defendants demand that petitioner shall furnish proof.

These defendants suggest that the allegations in the last paragraph of Sub-division II, page II of the petition are, as they are advised, purely conclusions which they need not answer although to their silence in this behalf no admission as to the truth of such conclusions is to be imputed; but, if such allegations require an answer, defendants deny any knowledge, information or belief with respect thereto and demand that petitioner shall furnish proof.

These defendants deny that they or any of them or any of the other defendants named in the petition are, or have been, engaged in any unlawful combination or conspiracy in restra-nt of interstate

trade or commerce, or in any unlawful attempt to monopolize the same, as described in the last paragraph of Sub-division II on page 11 of the said petition, or otherwise.

III.

These defendants deny that during the latter part of the year 1909, or early in 1910, or at any time they, or any of them, engaged in a combination or conspiracy in restraint of interstate and foreign trade and commerce in Sanitary Enameled Iron-Ware, in the manner set forth in Sub-division III of the petition, or otherwise, either among themselves or with any of the defendants named in the petition, or that since that time they the other defendants, or any of them have been, or now are, engaged in such combination or conspiracy, or that interstate and foreign commerce has been or is now being restrained by any combination or conspiracy of the defendants among themselves, or with the other defendants, or any of them, in the manner alleged in the petition, or otherwise.

These defendants deny that by agreement either among themselves, or with the other defendants named in the petition, they have unlawfully, or at all, eliminated or suppressed competition between each other as to prices at which they are selling in interstate and foreign commerce their products in Sanitary Enameled Iron-Ware, or that they have unlawfully, or at all, fixed or established, or are now maintaining uniform prices and terms of sale to their respective customers.

These defendants deny that the discounts which the defendants named in the petition quote and allow to jobbers in carrying on such commerce are arrived at by agreement between the defendants among themselves, or that each defendant quotes and allows such discounts only as agreed upon, known to and accepted by the other defendants named in the petition.

These defendants deny that they are observing any method of selling products of Sanitary Enameled Iron-Ware to jobbers whereby each jobber is compelled to sell at certain re-sale prices.

These defendants allege that they never have at any time during the last four years or more nor do they now sell to any jobbers of plumbing supplies whatsoever, not, however, for the reason that they have agreed not to do so with any other defendant in this action, but for the reason that the business of the Colwell Lead Company is itself the business of a jobber in plumbing supplies, and that the business of the said Colwell Lead Company and these defendants have always been and still is selling of all plumbing supplies direct to plumbers, plumbing contractors and the public generally.

These defendants deny that they have agreed that they will not sell any products to any person or company who is not recognized as a jobber, or that these defendants confine their sales to persons whom the defendants consider to be legitimate jobbers of Sanitary Enameled Iron-Ware.

These defendants further allege that prior to the times set forth in the said petition, the defendant, Colwell Lead Company, had taken a license under letters patent of the United States, No. 633,941,

issued September 26, 1899, to James W. Arrott, Jr., for a dredger for pulverulent material, and these defendants used the same at their factory at Elizabeth, New Jersey; and these defendants further allege that thereafter and in the spring of 1910, the said defendant, Colwell Lead Company, was required and did take a new license from one Edwin L. Wayman, who was then the owner of said letters patent, and likewise and at the same time took from him a license under United States Letters patent, No. 949,625, for a pneumatic sieve, and letters patent No. 939,918, for an enameling powder distributer, which licenses are somewhat similar to Exhibit A attached to the petition, but deponent begs leave upon the hearing of this cause to refer to the original of said license, but these defendants deny that Sanitary Enameled Iron-Ware is sold by these defendants to jobbers at all, and particularly, is not sold by these defendants to jobbers under any agreement whatsoever; and these defendants allege that they never at any time entered into any agreement similar to Exhibit 9 attached to the petition herein, or that they ever asked any person or corporation to execute any agreement similar to Exhibit 9. And, except as herein admitted, the defendants deny the allegations contained in the two full paragraph on page 12 of the petition.

These defendants deny that the combination alleged in the paragraph commencing at the bottom of page 12 of the petition exists, or that the result of the alleged combination is that throughout the United States all purchasers and users of the aforesaid products of Sanitary Enameled Iron-Ware are obliged to pay the same prices, or that such prices have been or are now fixed by the defendants named in the petition by mutual agreement, or otherwise, without competition with each other or otherwise.

These defendants deny that they, or any of them, have devised means by which each of them is advised of the amount of output of each of the other defendants named in the petition in order that thereby they may, by agreement, limit and restrict respective outputs as may seem advisable; and aver that they do not derive, under the terms of the licenses, knowledge of the output of any of the defendants named in the petition, and aver that at no time is any information so gained for the purpose of limiting and restricting their respective outputs.

These defendants deny that they have divided the United States into certain territorial or geographical zones, and they further deny that by the alleged system of dividing the United States into zones, or any other system of contract, jobbers are restricted in making sales to the zone in which such jobber is located. They deny that there is any arrangement whereby the jobber is not allowed to sell outside of his alleged zone. They deny that the manufacturers have adopted the feature alleged, or any other unlawful feature, to restrict the competition between jobbers and to enable them to hold the jobbers firmly to the alleged selling arrangement and to the re-sale prices fixed by the combination, the existence of which alleged selling arrangement and said alleged combination defendants deny.

These defendants deny that among themselves or by agreement with the other defendants named in the petition, or otherwise, they have largely and unreasonable increased the prices at which they sell their products to jobbers; these defendant deny that the defendants have more particularly advanced the re-sale prices of jobbers by their alleged system of contracts controlling re-sale prices, and aver that there is no agreement among the defendants named in the petition, or any of them, as alleged.

These defendants deny that the defendants named in the petition, or any of them, are co-operation in fighting the manufacturers of Sanitary Enameled Iron-Ware, or dealers therein, in interstate commerce who have not become parties to the alleged combination, and deny the existence of the alleged combination; and the defendants further deny that all of the defendants, or any of them, have united or are engaged in a common effort to force the said manufacturers or dealers into the alleged combination, or to drive them out of business.

These defendants deny the other allegations in said paragraph contained, and aver, that whatever terms are fixed in the license given by the defendant Wayman, upon which the several manufacturers sell to jobbers, are matters which do not in any way, shape or manner effect the business of these defendants, for the reason, as hereinbefore set forth, that these defendants have not at any time and do not sell to any jobbers of plumbing supplies whatsoever.

These defendants deny that they, or any of the defendants named in the petition, have been establishing and enforcing a system of severe penalties which are imposed upon such members of the alleged combination as depart from the alleged rules respecting prices and terms fixed by the alleged combination, and deny that there is any combination among the defendants or any of them. These defendants deny each and every other allegation in the first full paragraph of said petition on page 14, and aver that the full terms upon which the several manufacturers, defendants herein, are licensed, are set forth in the licenses above referred to, to the originals of which for greater particularity the defendants beg leave to refer upon the hearing of this cause.

IV.

These defendants deny that the defendants named in the petition, or any of them, have entered into any combination of the character described in the petition, or otherwise, and further deny each and every other allegation in said first paragraph of Sub-division IV; and aver that the licenses which the defendant, Wayman, has given to the various licensees have been given by the defendant, Wayman, and accepted by the defendants in good faith and upon the advice of counsel to the effect that such licenses were based upon the patents laws of the United States and that these defendants are advised and believe the same to be lawful, and these defendants allege that they accepted such licenses from the said Wayman for the reason that these defendants had for a considerable period prior thereto used the Arrott patents and had the same installed in their

factory at Elizabeth, New Jersey, and for the reason that they consider the same a necessity in the manufacture of Sanitary Enameled Iron-Ware for the use of the defendants only in their jobbing business conducted in the City of New York aforesaid; and for the further reason that the said license was the only form that these defendants could obtain a renewal of the existing license.

These defendants deny, as alleged in said Fourth paragraph on page 15 of the petition, that they are selling and shipping their products of Sanitary Enameled Iron-Ware throughout the United States and abroad, or that they are engaged in interstate or foreign trade or commerce.

These defendants deny the alleged conditional assignment of the three patents, or any of them, referred to in the said petition in paragraph 2 of Sub-division IV, or that the defendant, Wayman, was selected as the assignee thereof by agreement of the defendants, or any of them, or any of the defendants named in the petition, and defendants deny each and every of the other allegations in said paragraph contained.

These defendants aver that the defendant Wayman is the owner of the three patents specified in the full paragraph on page 15 of the petition, and that he purchased same from certain of the defendants named in the petition, pursuant to, as defendants are informed and believe, certain several options.

And these defendants further aver that the contracts under which said defendant Wayman purchased the said patents are, as these defendants are informed and believe, in writing, to the originals of which for greater particular-ly the defendants beg leave to refer on the trial of this cause.

Except as averred, these defendants deny that the said purchases were made as the result of any agreement between the defendant Wayman and these answering defendants, or any of them, or any of the defendants named in the petition; and further deny, except as herein stated, each and every allegation in said full paragraph on page 15 contained.

These defendants deny that prior to the granting of the license by the defendant Wayman these defendants had manufactured their product without the use of the invention covered by said patents, and these defendants admit that the inventions covered by the said letters patent are useful and valuable in the manufacture of Sanitary Enameled Iron-Ware; but these defendants deny each and every other allegation in the first full paragraph on page 16 of the petition contained.

These defendants deny that before the assignments to the defendant Wayman of the letters patent referred to were made they had agreed either with him or among themselves, or with any of the defendants named in the petition, upon all the essential feature of the licensing agreement. These defendants deny any agreement among themselves, or with the other defendants named in the petition, or any of them, whereby the defendant Wayman was to become the ostensible licensor, or that he was the ostensible licensor, and deny that a price list had been agreed upon between defendant

Wayman and these defendants, or among themselves, or with any of the other defendants named in the petition, and they deny each and every other allegation in said paragraph contained, and aver that there was no agreement among the manufacturers and aver that before any agreement had been made with any manufacturer, defendant Wayman had secured an option for the purchase of Arrott and other patents.

These defendants admit that Exhibit 8 attached to the petition is generally a correct copy of the form of the license issued by said Wayman, but these defendants have no knowledge or information sufficient to form a belief as to Exhibits 9 and 10, for the reason, as hereinbefore stated, that these defendants are not concerned with said agreements and have never entered into the same or any of them.

And these defendants specifically deny that they had any agreement or under-standing with any of the other defendants at any time prior to the time these defendants received their license aforesaid from said Wayman respecting the terms and conditions of said license, or that they had any knowledge or information with reference to the agreements existing between the other defendants with respect thereto.

These defendants deny that Exhibits 1 to 7, attached to the petition, evidence the manner in which the license arrangement was arrived at; that Exhibits 11 to 17, attached to the petition, illustrate the methods of the defendants and the effect of the combination upon independent manufacturers and jobbers who have not signed the license agreements, and beg leave upon the trial hereof to refer to the originals of said exhibits for greater particularity.

These defendants deny that all the terms and conditions of the contracts and agreements which together make up the alleged licensing arrangement had been agreed upon by all the defendants, or any of them, prior to the assignment of the patents to the defendant Wayman. These defendants deny that each defendant stipulated, as a condition precedent to his executing the license agreement, that all the others should execute a similar agreement. These defendants deny the allegation that no defendant would have executed the agreement unless he had been certain that all of the other defendants would execute it. These defendants deny that the agreement on the part of all of the defendants to enter into the license arrangement was a condition precedent to the assignment of the patents to defendant Wayman, and defendants deny the existence of any agreement on the part of all the defendants, or any of them, to enter into the license agreement as a condition precedent to the assignment to defendant Wayman. These defendants deny the allegation that there would not have been an assignment to the defendant Wayman, or that no license agreement with any of the defendants would have been arrived at if all the corporation defendants had not agreed to go into the alleged scheme. These defendants deny the allegation in the petition that all the parties to the alleged arrangement were not seeking the use of a valid and essential patent necessary in the carrying on of their business, and

defendants further deny that they were engaged in a price fixing plan to wrongfully and unlawfully eliminate competition; and deny each and every other allegation in said paragraph on pages 17 and 18 of the petition contained.

V.

These defendants deny each and every allegation in Sub-division V of the petition contained.

VI.

These defendants deny all the allegations contained in Subdivision VI of the petition, except that they admit that the defendants, A. Weislittel & Son Company, Anton Weiskittle and John D. Heise, are located and doing business within the State and District of Maryland, and that said individual defendants reside therein.

Furthermore, and for a more complete answer, these defendants say:

VII.

That prior to the invention of James W. Arrott, Jr., covered by letters patent of the United States No. 633,941, issued September 26, 1899, to said Arrott for enameling sanitary enameled iron-ware, Sanitary Enameled Iron-Ware was enameled by a hand process. This process consisted generally of sifting over the surface of the Iron-Ware, when heated to a red heat, the enameling powder. Enameling powder is supposed and intended to consist of such materials as when fused to form on the iron to be enameled a hard, impenetrable, insoluble, smooth and glossy surface. A sieve containing a quantity of the powder was attached to the end of a handle. The workman held the handle of the sieve with one hand and arm and moved the sieve horizontally over the surface of the iron-ware to be enameled, at the same time striking the handle with his other hand to cause the sieve to vibrate and sift the enameling powder over the surface of the iron-ware to be enameled. The powder jetted through the sieve in intermittent puffs or waves with each blow, and this, and the physical strain and intense heat caused, in a great many instances, the unequal distribution of the powder over the surface of the ware, which resulted in the enameling being wavy or rippled, uneven, or otherwise defective, and rendered the article enameled unsightly, less durable and unsaleable at a profit. The workman on account of the intense heat went through the enameling process as hurriedly as possible, with the result, in a great many instances, that the articles produced were worthless and had to be thrown away, or were so-called "seconds" and had to be sold at a price resulting in little, or no profit to the manufacturer. The process was laborious and slow and consequently more readily fusible enameling powder had to be used which resulted in a less impervious, insoluble and durable and permanently glossy surface. Furthermore, it was injurious to the health of the workmen and it was difficult to secure men physically capable of performing the work, and more difficult to train such men, as were capable, to do the work properly.

Arrott's invention, by using a mechanically operated agitator, in connection with the sieve, made possible the flowing of the enameling powder in a continuous stream, enabling the enameler to distribute the enameling powder evenly, equally and uniformly over the surface of the article to be enameled, as though the powder were a flowing thin liquid. With Arrott's invention, a workman can, by touching a valve button, secure a rapping action which is rapid, continuous and uniform. At the same time his hands are free both to sustain the load and to move the sieve over the surface and get a uniform lateral powder distribution. The blows are so rapid and regular that the powder, instead of jetting through the sieve in a puff or distinct wave with each hand-struck blow, flows in a practically continuous regular sheet. Arrott's invention enables the enameler to be under a much less strain in the face of terrific heat, it enables him to enamel a very much greater number of articles per hour, and the work can be done by an average man of less physical strength than was required in the former process, and he can be more easily and quickly taught to do the enameling successfully. Arrott's invention is labor and material saving, and effective, and, in relieving to a degree labor under fierce heat and conditions, arose to the plane of the humane.

VIII.

The manufacturers of Sanitary Enameled Iron-Ware recognized the necessity of Arrott's invention to the successful manufacture of Sanitary Enameled Iron-Ware. Many of them used the invention described in the patent, or equivalent means, for enameling the ironware. In all cases the owner of the patent claimed that such manufacturers were infringing the patent and demanded an accounting and damages under threat of suit for infringement. Some of the manufacturers settled with the owner of the Arrott patent by paying a lump sum of money in settlement of the claim for damages and claimed to have abandoned the use of the invention. Others sought to gain time, well knowing that in the end they would have to stand suit for infringement, pay damages, abandon the use of the invention, or take a license under the patent. Others without formally taking a license, made periodical payments to the owner of the patent in order to be allowed to continue the use of the invention. Still others were sued for infringement and judgment obtained against them by the owner of the patent, which judgments were settled by the payment of a sum of money.

IX.

Prior to the defendant Wayman granting the licenses herein referred to, the Arrott patent had been sustained by the Courts in several cases.

X.

For the reasons stated, the art was in a very unsatisfactory condition. No means had been discovered of accomplishing the result produced by the use of the Arrott invention without laying the user

of such means open to a suit for infringement by the owner of the Arrott patent. The manufacturers using the process in use prior to Arrott's invention were unable to successfully complete with those using the Arrott invention, and moreover, produced a disproportionate number of defective, unsightly and substantially unsaleable articles. The consumer was deceived and defrauded and the use of Sanitary Enameled Iron-Ware lessened and its reputation depreciated by defective articles being palmed off on the consumer as not defective.

XI.

That these defendants fully realized the value of the use of the inventions covered by the letters patent referred to and that it would cause numerous economies in material, labor, time consumed, increase output, and avoid the great loss caused by the production of defective articles. These defendants, therefore, procured a license for the use of the said Arrott patents and installed the same in their factory at Elizabeth, New Jersey, and were using the same at and prior to the time of the alleged conspiracy set forth in the petition herein; and that thereafter, when the defendant Wayman became the owner of the said patents, together with other patents referred to in the said petition, and proposed to issue a new license to these defendants upon more favorable terms to these defendants, they readily accepted the proposition as made by Wayman as being greatly to their benefit. These defendants are advised by their counsel, and therefore aver that the said licenses are in all respects lawful, and that in acting in accordance therewith they are not violating the laws of the United States, or of any of the several States, and particularly are not violating the Act of Congress commonly known as the Sherman Anti-Trust Act.

And these defendants deny *that* all and all manner of unlawful combination and confederacy wherewith they are by the said petition charged; without this, there is any other matter, cause or thing in said petition contained material or necessary for these defendants to make answer to, and not herein and hereby well and sufficiently answered, confessed, traversed, and avoided or denied, is true, to the knowledge or belief of the defendants, all which matters and things the defendants are ready and willing to aver, maintain and prove as this honorable Court shall direct; and humbly pray to be hence dismissed, with their reasonable costs and charges in this behalf most wrongfully sustained.

NOBLE, JACKSON & HUBBARD,
CARROLL T. BOND,
Solicitors.

STATE OF NEW YORK,
County of New York, ss:

Jesse T. Duryea, being duly sworn, deposes and says:

I am the President of the Colwell Lead Company, one of the defendants named in the foregoing answer; I have read the foregoing answer and am familiar with the contents thereof; the same is true of my own knowledge except as to the matters therein stated to be

alleged upon information and belief, and as to those matters I believe it to be true.

JESSE T. DURYEA.

Sworn to before me, this 13th day of January, 1911.

[NOTARY'S SEAL.] FREDERICK J. SHERMAN,
Notary Public, Westchester Co.

Certificate filed in New York County, No. 2113.

STATE OF NEW YORK,
County of New York, ss:

Jesse T. Duryea and Bert O. Tilden being duly severally sworn depose and say, and each for himself deposes and says, that he is one of the defendants named in the foregoing answer; that he has read the foregoing answer and is familiar with the contents thereof; that the same is true of his own knowledge except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

JESSE T. DURYEA.
BERT O. TILDEN.

Severally sworn to before me, this 13th day of January, 1911.

[NOTARY'S SEAL.] FREDERICK J. SHERMAN,
Notary Public, Westchester County.

Certificate filed in New York County, No. 2113.

Replication to Answer of Edwin L. Wayman.

Filed October 20, 1910.

In the United States Circuit Court, District of Maryland.

No. —.

UNITED STATES OF AMERICA, Petitioner,
vs.
STANDARD SANITARY MANUFACTURING COMPANY and Others,
Defendants.

Replication to Answer of Defendant Edwin L. Wayman.

For replication to the answer of the defendant Edwin L. Wayman, the United States of America says that the allegations of its petition are true and that the defendant's answer as set forth is not true, and this the petitioner is ready to prove.

JOHN PHILIP HILL,
United States Attorney for the District of Maryland.
EDWIN P. GROSVENOR,
Special Assistant to the Attorney General.

Replication to Answer of Standard Sanitary Manufacturing Co. and Others.

Filed October 20, 1910.

In the United States Circuit Court, District of Maryland.

No. —.

UNITED STATES OF AMERICA, Petitioner,
vs.
STANDARD SANITARY MANUFACTURING COMPANY and Others,
Defendants.

Replication to Answer of Defendants the Standard Sanitary Manufacturing Company and Others.

For replication to the answer of the defendants

Standard Sanitary Manufacturing Company,
The J. L. Mott Iron Works,
L. Wolff Manufacturing Company,
Theodore Ahrens,
Francis J. Torrance,
E. L. Dawes,
W. A. Myler,
Jordan L. Mott,
Max Goebel,
Ludwig Wolff and
Herman Hoelscher,

the United States of America says that the allegations of its petition are true and that the defendants' answer as set forth is not true, and this the petitioner is ready to prove.

JOHN PHILIP HILL,
United States Attorney for the District of Maryland.
EDWIN P. GROSVENOR,
Special Assistant to the Attorney General.

Replication to Answer of A. Weiskittel — Son Company and Others.

Filed February 20, 1910.

In the United States Circuit Court, District of Maryland.

No. —.

UNITED STATES OF AMERICA, Petitioner,
vs.
STANDARD SANITARY MANUFACTURING COMPANY and Others, Defendants.

Replication to Answer of Defendants A. Weiskittel & Son Company and Others.

For replication to the answer of the defendants,

A. Weiskittel & Son Company,
The Barnes Manufacturing Company,
The Cahill Iron Works,
Colwell Lead Company,
The Day-Ward Company,
The Humphryes Manufacturing Company,
McVay-Walker Company,
The McCrum-Howell Company,
National Sanitary Manufacturing Company,
Kerner Manufacturing Company,
Union Sanitary Manufacturing Company,
United States Sanitary Manufacturing Company,
Wheeling Enameled Iron Company,
Anton Weiskittel,
John D. Heise,
C. H. Voegele,
T. R. Barnes,
F. H. Caldwell,
J. J. Mahoney,
Jesse T. Duryea,
Bert O. Tilden,
W. C. Winfield,
A. G. Ward,
S. N. Ford,
Reid Carpenter,
J. A. Frauenheim,
Thomas Walker,
Alexander C. Walker,
Lloyd G. McCrum,
Howard T. Gates,
Frank G. Borden,
D. W. Davis,
L. C. Huesman,

E. V. Brigham,
Charles Arrott, Jr.,
A. H. Cline, Jr.,
J. E. Wright, and
George W. Franzheim,

the United States of America says that the allegations of its petition are true and that the defendants' answer as set forth is not true and this petitioner is ready to prove.

JOHN PHILIP HILL,
United States Attorney for the District of Maryland.
EDWIN P. GROSVENOR,
Special Assistant to the Attorney General.

Expediting Certificate of the Attorney General.

Filed April 18, 1911.

In the Circuit Court of the United States for the District of Maryland.

Equity.

UNITED STATES OF AMERICA, Petitioner,
v.
STANDARD SANITARY MANUFACTURING COMPANY and Others, Defendants.

To the Clerk of said Court:

I hereby certify that the above entitled cause now pending in said court is a suit in equity brought by the United States against the Standard Sanitary Manufacturing Company and others, under the Act of Congress entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," approved July 2, 1890, and that said suit is in my opinion a case of general public importance.

I therefore request that, complying with the provisions of the Act of Congress entitled "An Act to expedite the hearing and determination of suits in equity pending or hereafter brought under the Act of July 2, 1890, entitled 'An Act to protect trade and commerce against unlawful restraints and monopolies,'" approved February 11, 1903, you will file this certificate among the records of the above entitled cause, and immediately furnish a copy thereof to each of the Circuit Judges of the Fourth Circuit, to the end that said case shall be given precedence over other cases in said court, and be assigned for hearing at the earliest practicable date before not less than three judges of said circuit, as is provided by the said act of February 11, 1903.

GEO. W. WICKERSHAM,
Attorney General.

Washington, D. C., December 19, 1910.

Order of Court Designating Honorable John C. Rose to Sit with the Circuit Judges on Hearing this Cause.

Filed May 2, 1911.

In the Circuit Court of the United States for the District of Maryland.

Equity.

UNITED STATES OF AMERICA, Petitioner,
vs.
STANDARD SANITARY MANUFACTURING COMPANY and Others, Defendants.

The Attorney General having in pursuance of the Act of Congress of February 11, 1903, (32 Stat., 823), filed his certificate in this cause, setting forth that the same is of general public importance, and requesting that in pursuance of the statute in such case made and provided, that this Court give precedence to this case, and proceed therein hereafter as set forth in the Act of the Congress of the United States alluded to in said certificate.

It is therefore hereby ordered that complying with said request the Honorable John C. Rose, District Judge for the District of Maryland, be and he is hereby designated to sit with the undersigned Circuit Judges on the hearing of this cause, which is, with the consent of counsel, set down for argument at Richmond, Va., on Thursday, May 25, 1911, at eleven o'clock A. M. May 2, 1911.

NATHAN GOFF,
Senior Circuit Judge.
J. C. PRITCHARD,
Circuit Judge.

Motion of Defendants for Enlargement of Time to Take Testimony.

Filed June 15, 1911.

In the United States Circuit Court, District of Maryland.

UNITED STATES OF AMERICA, Petitioner,
against
STANDARD SANITARY MANUFACTURING COMPANY and Others, Defendants.

The defendants move and pray the court to grant the defendants an enlargement of time to complete the taking of their testimony until after the trial and decision in the criminal proceedings now pending in the Eastern District of Michigan, against these same defendants, under the indictments found on or about December 7,

1910, the said indictments being laid upon the same matters, transactions and things as are involved in the issues in this case;

And the defendants further move and pray the court that the hearing of this case be had after the completion of the taking of the defendants' testimony.

It further appearing from the record that notice of this motion was given to the petitioner in due time, and that the said motion and all the rights in connection therewith were reserved at the time of the discontinuance of the taking of the defendants' testimony on or about April 22, 1911, under the orders of the Circuit Court for the District of Maryland.

This motion is made upon the ground, more fully appearing in the record, that the defendants were prevented from completing their testimony by taking the testimony of the several defendants, because the defendants were unwilling to testify voluntarily, lest in so testifying they should furnish information which might be used against them in the criminal proceedings above referred to, and by so testifying they would lose the rights secured to them by the Fifth Amendment to the Constitution of the United States.

Dated June 15, 1911.

NOBLE, JACKSON & HUBBARD,
Of Solicitors for Defendants.

HERBERT NOBLE,
WM. L. MARBURY,
Of Counsel.

Opinion of the Court.

Filed October 13, 1911.

In the Circuit Court of the United States for the District of Maryland.

In Equity.

THE UNITED STATES OF AMERICA, Petitioner,
v.
THE STANDARD SANITARY MANUFACTURING COMPANY et al., Defendants.

Before Goff and Pritchard, Circuit Judges, and Rose, District Judge.

Edwin P. Grosvenor, Special Assistant to the Attorney General, and John Philip Hill, United States attorney (with whom the Attorney General and James A. Fowler, Assistant to the Attorney General, were on the brief), for the United States.

Herbert Noble, William L. Marbury, and Hartwell P. Heath for the Standard Sanitary Manufacturing Co. and other defendants.

Robert B. Honeyman for the Colwell Lead Co.

ROSE, *District Judge:*

The United States brings this suit. It will be called the Government. Its petition is filed under the fourth section of the Sherman

Antitrust Act. It charges that the defendants have violated the first and second sections of that act. It says that they have conspired to restrain interstate trade in sanitary enameled ironware and have attempted to monopolize such trade therein. All the defendants are concerned in making and selling that ware. It is made of cast iron. It is coated with enamel. It has the appearance of being porcelain lined. Bathtubs, lavatories, closet bowls and tanks, sinks and urinals are among the more important articles made of it. It will be referred to as the ware.

There are 50 defendants. Sixteen are corporations. They will be called the corporate defendants. Thirty-four are individuals. They are styled individual defendants. One of them is Edwin L. Wayman. With him each of the corporate defendants made an agreement. These agreements the Government says restrain trade in the ware and attempt to monopolize it. The other 33 individual defendants are officers of the corporate defendants. The Government charges that they each were among the persons who knowingly caused the corporate defendants to do that of which it complains.

These 16 agreements were, with exceptions to be mentioned, identical in their language. At least 15 of the 16 corporate defendants had directly or indirectly taken part in drafting the common form. They were executed by nearly all the corporate defendants on the same day and at the same place. No defendant entered into the agreement without knowing that at least 13 of the other corporate defendants had executed it or intended so to do. Without this knowledge no one of them would have become a party to it.

Each of these agreements is in the form of a license, granted by Wayman, accepted by a corporate defendant. The patents under which the licenses purported to be granted were first put into Wayman's name, two days before most of the agreements were executed. The terms of the agreements had been definitely settled at least two weeks earlier.

There were three patents. They all were for automatic dredgers. A dredger is a tool used in the enameling step of making the ware. The licenses were granted for a period of two years beginning June 1, 1910. Each licensee promised on the fifth day of each month to pay $5 a day for each furnace used by it for the making of the ware during the preceding month. Wayman undertook that he would, three months later, pay back $4 out of every $5. This undertaking was conditioned upon the licensee having in the meantime done all he had agreed to do. There are about 25 working days a month. Wayman, on the 5th of every month, therefore, received $125 for each furnace continuously operated during the preceding month by any one of his licensees. One hundred dollars of this he was eventually to pay back. This repayment was not to be made until three months had gone by. After the first four months he would always have in his hands $300 of his licensees' money for every furnace of theirs in steady use. As it actually turned out, he usually held between $40,000 and $50,000 belonging to them. This money was in the nature of cash bail. Each corporate defendant in this manner

gave security that he would keep his bargain, or be good, as one of the licensees expressed it.

Each corporate defendant promised to do three things:

1. It would not sell any "seconds" or "B's" of any of the ware except bathtubs. It apparently reserved the right to market what the trade calls non-guaranteed bathtubs.

2. It would not sell any ware to any jobber who did not sign the jobbers' resale agreement to be presently described.

3. It would not sell anybody any ware at a lower price or upon more attractive terms than those named in the agreement or in a schedule attached to it. This schedule named standard prices for each article of the ware and for each size, shape, and grade of that article.

All the corporate defendants promised that they would not sell some articles below the schedule price. Some of them undertook not to sell any articles below those prices. Some of the corporate defendants had not the established reputation of others, or they had not as efficient a selling force. They would not take licenses unless they were allowed to sell some articles at a little lower price than those quoted by their stronger rivals.

After much negotiation it was settled by a committee of the corporate defendants that some of them should be allowed to sell some articles at a discount of 2½ in some instances, of 5 per cent in others, from the scheduled prices. The permission to give this discount, granted to some of the corporate defendants and not to others, was the only respect in which there was any difference among any of the agreements as executed. The negotiations as to which of the corporate defendants should be allowed by the others to give these preferential prices to their customers and how great the permitted discount should be was finished before any of the agreements were executed and before any of the patents had been put in Wayman's name.

The resale agreement which the jobber in the ware was required to sign bound him in two respects:

1. He could not buy any ware from anyone other than the corporate defendants.

2. He could not sell ware to anybody at a lower price or on more attractive terms than those named in the resale price lists.

The principles upon which these resale prices were to be worked out in detail had been agreed upon between Wayman and a committee chosen by nearly all of the corporate defendants. This agreement was reached before any licenses were accepted and before any of the patents had become Wayman's. The licenses provided that no changes in the sale or resale prices could be made without the consent of Wayman and the majority of a committee elected by the corporate defendants.

The agreements restricted in a number of ways the freedom of both the corporate defendants who made the ware and the jobbers who sold it to the plumbers. An article of the ware must always be billed separately from other goods sold at the same time to the same person. Many articles could not be shipped uncrated. No allow-

ance could be made for a returned crate, and so on. There were jobbers to whom these rules or some of them were distasteful. Dealers were forced to change the methods of doing business which they had followed for years to the mutual satisfaction of themselves and their customers. These requirements had a purpose. Competition in price can not be altogether shut off unless everybody is made in some respects to do busines in precisely the same way as everybody else.

Each jobber, like each maker, was called on to give cash security that he would carry out his bargain. He had to pay 5 per cent more for the ware than the maker expected to get out of it. If he had not cut prices and had not bought ware from any one other than the corporate defendants at the end of the calendar year he was entitled to receive a rebate of 5 per cent on the amount paid by him during the year. If his purchases from all the corporate defendants combined had amounted to as much as $30,000, his rebate was to be at the rate of 10 per cent.

Applications for rebates were to be made to Wayman. When he approved them they were paid by the corporate defendant or defendants which had sold the applicant the ware. Nearly 400 jobbers signed these agreements. They constituted more than four-fifths of all the jobbers in the country. The consumption of the ware is large. Wayman doubtfully estimated the annual value of the national output of it at $14,000,000. It is hardly less than $10,000,000. It may be much more. Upward of 80 per cent of the jobbers took licenses. They probably handled at least 80 per cent of the product. That is, their total yearly purchases from the corporate defendants must have footed up about $8,000,000. A rebate of 5 per cent on $8,000,000 amounts to $400,000; of 10 per cent to $800,000. Toward the close of every calendar year the corporate defendants would among them hold in the neighborhood of half a million of the jobbers' money.

Moreover, the agreements told the jobbers in plain words that if they cut prices or bought ware from anybody other than the corporate defendants none of the latter would sell them again.

There were jobbers who did not like some of the new rules. Some of them thought their money would be more useful in their own bank account than in that of the corporate defendants. A little less than one-fifth of them refused to sign the agreements.

On the other hand, there was, from the jobbers' standpoint, much that was attractive in the scheme as a whole. Competition had been fierce. It had not always been either wise or honest. A badly made article may look well enough to deceive the average householder. Many such had been put on the market. When the defects were speedily discovered the jobber might have to take back the article. The cost of doing so ate up the profit on a number of like articles which were not returned. There was little profit in handling the ware. If every dealer signed the agreement none of them could gain by taking from the makers and putting off on the public any ware except bathtubs, not standard of its kind. The lowest price the makers could take would buy a good article. No

one would have a "second" if for the same money he could get a standard. Moreover, while nonguaranteed bathtubs could be sold, the price below which they could not be sold was fixed. The jobbers would therefore insist on getting the best of that not very good grade.

With the worst-made articles taken out of the market friction with customers would be lessened. The reputation of the ware would be raised. Every jobber would know that he was buying and selling on the same terms as his competitors. He could tell to the fraction of a cent what his gross profit on every article sold by him would be. He could regulate accordingly his expenditures for handling and advertising it.

If he did not take a license he took large chances. No one of the corporate defendants would sell to him.

Of 250 furnaces in the country, the defendants owned 195, or 78 per cent. In drawing building specifications architects frequently called for ware made by a particular manufacturer. A jobber who could not furnish a plumber with what he wanted for a large job was likely to lose his custom altogether. May, 1910, must have been a trying time for jobbers with a stubborn liking for independence and a taste for managing their own business in their own way.

As already stated, in the end four out of every five of the jobbers signed up. Many of them did so willingly and even enthusiastically. It is probable that the large majority of them welcomed the chance of doing so. Their associations had been urging the manufacturers to put in force a resale arrangement. A number of them have testified that they wanted it. While it lasted, they say, they found it pleasant and profitable. In consequence of these proceedings and of other action taken by the Government, the corporate defendants on January 1, 1911, suspended so much of the agreements as fixed original and resale prices. Many of the jobbers regret the suspension.

With whatever of enthusiasm, with whatever of reluctance, the makers of nearly four-fifths of the ware and more than four out of every five dealers in it became parties to the combination.

The corporate defendants, and many, if not most of the jobbers, were engaged in interstate commerce in the ware. Such commerce was directly restrained by the agreements. The makers who became parties to them could no longer sell the jobbers who did not. The jobbers who did could no longer buy from the makers who did not.

The defendants did their best to get all the makers of importance and all the dealers to become parties to the scheme. If they had succeeded, Wayman and a committee of the corporate defendants would for two years from June 1, 1910, have been able to say that no man anywhere in the United States should buy a bathtub or any other article of the ware at a lower price than it might have suited them to fix. If the trade would then have been monoplized, the defendants attempted to monopolize it.

The important questions in the case are two:

1. Would such a combination as was attempted, and in large part

brought about, have violated the Sherman Act, had patents on automatic dredgers played no part in it?

2. If it would, did the part played by those patents make lawful what otherwise would have been forbidden?

The defendants argue that not every agreement to fix and maintain prices in interstate commerce violates the Sherman Act. They say that eyes illumined by the light of reason will see that what the defendants did was from the standpoint of the public interests good and not evil. They contend that the jobbers were making little profit on the ware. It was troublesome and costly to handle. "Seconds" were on the market. The ware was getting a bad reputation. If the defendants had not done what they did there would soon have been no trade either to restrain or to monopolize.

There is little in the record to support this contention. Such an apprehension is vaguely expressed by some witnesses. If there had been a marked falling off in the sale of the ware, the defendants knew it. They could have shown it by definite and precise figures. They made no attempt to do so. If there was any such danger it was very remote—far too remote to justify the defendants in doing anything which except for it would have been unlawful. That there was any real danger at all is not shown.

According to the defendants, the public gained by what was done, even upon the assumption that if it had been left undone the trade would have continued in undiminished volume.

The ultimate purchaser of the ware seldom knows whether he gets a well-made article. To his eyes it may look well. He may think it will for years be useful, sightly, and sanitary. In a few months he may find that it is wearing badly and has become unsightly. He may have reason to fear that to some slight extent it has become dangerous to the health of himself and his family. He suffers from the greed of the maker, the jobber, or the plumber, or of two or all of them. He will be in no danger from that greed when no one of them can any longer make any money by selling him a bad article for the price of a good. Human nature being what it is, no other effective protection can be given him. If the so-called "seconds" and "B's" are put upon the market at all most of them will in the end be bought by people who do not know what they are buying. It is useless, according to this argument, to call the makers together and ask them to stop selling such goods. Resolutions pledging all the manufacturers to stop making and selling them, it is true, may be easily passed. They will be adopted with enthusiasm or with solemnity according to the mood of the moment, but always with absolute unanimity. Like so many other gentlemen's agreements, they will be straightway broken.

If an enforceable bargain can be made that no goods shall be sold below a certain fixed price which will yield a reasonable profit on a first-class article, jobbers and plumbers can be depended upon not to pay that price for an inferior article.

The defendants say that in no other way can seconds be taken off the market and kept off. They point to what happened after January 1, 1911, when the price-fixing provisions of the agreement were

suspended. The prohibitions against selling "B's" and "seconds" were still in full force. Nevertheless the defendants' witnesses say that the market was at once flooded with low-grade ware. Much of it came from some of the corporate defendants. It may be better for the public to pay a higher price for better ware. Most individuals find that it is usually cheaper in the end. Still two questions remain:

(1) Does the law permit the additional price which the public is to pay to be fixed by a combination of dealers, even if the latter do so because they can not in any other way keep some of their own number from selling bad ware for good?

(2) Has the experience of mankind led them to believe that to permit all the makers and dealers in articles of common use to combine to fix the prices and terms below which those goods may not be sold will tend in the long run to improve the quality of the goods?

The second question is not for the courts. The learned counsel for the defendants say that the first need not be answered in this case. They claim that prices were not raised by the defendants. They assert that the evidence shows that they were in fact lowered. The contention rests on a statement of Wayman. He says that the prices as fixed were intended to be on an average about 5 per cent below those named in the last previously published price list of the defendant, the Standard Sanitary Manufacturing Company. The counsel for the defendants in supposing that Wayman meant that he reduced the then actually prevailing prices have misapprehended the market conditions. They assume that the Standard and the other corporate defendants were in fact getting the prices set forth in their catalogues. The record shows that they were not. Whether they ever had does not appear. They certainly had not during any of the period as to which the record speaks. If in the winter and spring of 1910 those prices had prevailed there would have been no agreements and consequently no case. The agreements as made became fully operative June 4, 1910. No witness says that the published list prices had for many months been generally paid. The evidence is overwhelming that they had not.

On August 4, 1909, Wayman became commissioner or actuary of a newly organized or reorganized Sanitary Enameled Ware Association. All the corporate defendants except the Kerner Manufacturing Company belonged to it. Four other makers of the ware were members of it. These four refused to enter into the price agreements. Consequently they did not take licenses from Wayman. One of his duties as commissioner of the association appears to have been to do what he could by argument and expostulation to prevent price cutting among its members. To this end he wrote many letters. In one of them he speaks of cuts from 2½ to 5 per cent below the published prices as the normal and usual thing. He takes them for granted. They are not cause for complaint. What worries him is the cuts of 20 per cent which he says were then being made. In March, 1910, the terms of the agreements executed two months later were being worked out by corespondence and confer-

ences among the defendants. In that month Commissioner Wayman urged the members of the association to stop quoting what he called the "ridiculous" prices which had recently been made. The Standard Sanitary Manufacturing Company, whose published price lists defendants' counsel suppose show the actual market prices, appears to have had a regularly organized system of rebates.

When the agreements now in controversy went into effect, the Standard notified its customers that their special rebates would be withdrawn. They were told, however, that checks would be sent them for whatever rebates were then due.

The correspondence between the Standard and another of its customers shows that he had been buying at the "supposed" carload limit price less a confidential 7½ per cent discount. Whether the "supposed" carload limit price was the published price or a generally understood discount below it does not appear.

The record contains many letters written by jobbers to some one or the other of the corporate defendants asking that orders alleged to have been sent in before June 4, 1910, should be filled at the old prices. Sometimes their requests were granted. They were grateful. Sometimes they were told that their order had not come to hand before June 4. If filled it must be at the new prices. A long correspondence usually followed. The jobber tried hard to get the ware at the old price.

Many letters passed between one Sullwold and the defendant Ahrens. Ahrens is president of the Standard. Sullwold is head of a Minneapolis jobbing house. He did not like the new scheme. Ahrens tried to get him to come into it. They wrote each other at great length. They go into many details. Whenever one thinks he can make a point on the other he does so. Sullwold repeatedly says that the ware will cost the jobbers more. Ahrens does not deny. Both take it for granted.

Wayman testifies that to stop "ruinous competition" was one of the purposes of the agreements.

The J. M. Kohler Sons Co., of Sheboygan, Wis., was a member of the Sanitary Enameled Ware Association. Wayman and a member of the defendants worked hard to get it to take a license. It would not. It claimed that the scheme was a price agreement pure and simple. It said that price agreements were forbidden by the laws of the United States and of Wisconsin. One Kroos is connected with it. He was a witness for the Government. He presented some elaborate calculations as to the difference between the prices his company had been getting for the ware and the prices it would have received under the Wayman plan. As he figured it, the latter were in every instance greater. The difference ranged from 1 to 45 per cent. Defendant's counsel say that he did not know what he was talking about. According to them he did not understand how the price tables of the defendants were to be applied. He, however, gave the prices of his own company for the various articles principally dealt in by it and the defendants. It would have been easy for the latter to show what the true comparison was, if it had seemed to them

expedient so to do. It is, however, not important to determine whether Kroos did or did not fall into error.

There is in the record a letter to the Standard Sanitary Manufacturing Company from one of its customers. It was written shortly after the price agreements went into effect. In it the writer remarks that, of course, the Standard understood that he could not do much with their prices so long as Kohler continued to sell at the prices it was then making. Quite clearly the new prices were materially higher than Kohler's.

The record shows that the agreements were intended to raise prices and that they did so. How great the increase was is not shown either in percentages or in dollars and cents. To have figured it out would have taken much time and money. Very likely no one knows how much prices were raised. Each defendant knows how much more it took in under the agreements than it had obtained before. No one of them had any accurate knowledge as to the gain made by any one of its 15 corporate co-defendants. Not every one of them would have found it easy to tell what the precise percentage of increase in the price received by it for each kind of article had been. Before the agreements went into effect there was no fixed price. In every large transaction, and in many that were not large, the price actually paid was the outcome of a special and usually of a secret bargain.

Not only did the agreements raise prices—they prevented reductions that would otherwise have been made. The market conditions in the winter and spring of 1910 were such that prices left to themselves would have gone still lower. How rapidly the drop would have run into money is shown by a statement of the president of the Standard. He was trying to get the Kohler Co. to take a license. He pointed out how good a thing the scheme was from the manufacturers' standpoint. He said if it did not go through it would cost the Standard's stockholders $300,000 in 1910, for in that event he would have to reduce prices.

The defendants say that prices may be too low for the public good. Competition may be carried far enough to hurt everybody concerned. It may in the end be the direct cause of monopoly. Under its stress all but the strongest producers may go to the wall. The Government replies that if all the makers of an article of common use combine to raise and maintain prices and to punish any one of their number who reduces them, all the evils which to common experience of mankind result from monopolies will surely follow. Possibly both the defendants and the Government speak truly. It may be that one of the great problems of the day is to find some way of protecting the general public against monopolistic combinations without compel-ing business men to subject themselves and their capital to all the perils of unrestrained competition. To find its solution would appear to be the business of the statesman. The defendants say the courts may give it. In their opinion makers and dealers may combine to raise prices without violating the Sherman Act, provided that the prices fixed by their agreement are not unreasonably high.

In each particular case upon the evidence submitted the courts must say whether the prices asked are or are not reasonable. It would not be an easy task. Some standard of reasonableness would have to be worked out. The factors to be taken into account would be numerous and complex. The labor and expense of finding out what all the relevant facts were would be enormous. After all was done and said the margin of doubt would usually remain large. If the dealers were bound to show affirmatively that their prices were reasonable, the Government would usually win. If the Government had to show that they were unreasonably high, it would ordinarily lose. In this case the defendants assume that the burden of proof as to the unreasonableness of their prices is on the Government. They say, and say truly, that the Government has neither shown nor attempted to show that the schedule prices were unreasonable. The Government replies every agreement to fix prices and to force or bribe makers or dealers to maintain them is illegal. In its view there are no circumstances in this case which take it out of the general rule.

The presumption of the law is that the prices which have been made by the free and untrammeled trafficking of the market place are the reasonable prices. Anyone who interferes with the natural action and interaction of this bargaining assumes the burden of showing that what he did was fair and reasonable. If such a burden rests on the defendants, it has not been sustained. They have not shown what capital they have invested in the business. They have not told what net profit, if any, they earned under the old prices.

These opposing contentions raise questions of great moment and of exceeding difficulty. To answer them wisely may require going to the very roots of our conceptions of what the relation of the State to the industrial life of its people should be. Everyone has the right to discuss them. It may be a duty to do so at all reasonable times and in all proper places. This opinion is not a proper place for such a discussion. Some men believe that price agreements should be sustained by the courts unless they are shown to be against the public interest. Others hold that they may be permitted only when it is affirmatively shown that they promote the public interest. Still others say that a price agreement pure and simple is always illegal. That the Supreme Court has declared the last of the above-stated contentions to be the law is conclusive here. Only a few months ago it said:

"Agreements or combinations between dealers having for their sole purpose the destruction of competition and the fixing of prices are injurious to the public interests and void."

Dr. Miles Medical Co. v. John D. Parks & Sons Co. (220 U. S., 408).

At the moment we are considering only one question. Would the agreements have violated the Sherman Act had the dredger patents had no part in them? They destroyed competition. They fixed prices. For that purpose they were made. They had no other. Defendants say that to fix prices and to destroy competition

would have been to their profit and to the public good. They may not break the law because they think that it will be well to do so. In view of the character of the parties the necessary effect of the agreements was clearly to restrain trade within the purview of the statute. In such case they can not be taken out of the category of the unlawful by general reasoning as to their expediency or non-expediency or the wisdom or want of wisdom of the statute which prohibited their being made. When the nature and character of the contracts create a conclusive presumption bringing them within the statute, such a result is not to be disregarded by the courts by a substitution of a judicial appreciation of what the law ought to be for the plain judicial duty of enforcing the law as it is.

Standard Oil Co. v. United States (221 U. S., at page 65).

It follows from what has been said that unless protected by the terms or the policy of the patent laws the agreements violate the Sherman Act.

II.

Did the part played by the patents make lawful what was otherwise forbidden?

The ware is made of cast iron. After it has been shaped it is enameled. Enameling involves two distinct processes. In each there are several steps. The ware is first given what is called the "slush" coat. This is enamel applied in liquid form. It is burnt on the base by the application of intense heat. The article is placed in a furnace. It is raised to a red heat, say 1,500° F. or upward. It is taken from the furnace. While it still glows powdered enamel is sprinkled upon it. It is put back in the furnace. It is again heated. When it is taken out it usually is again sprinkled with the powder. If so, it is again reheated to fuse the enamel upon its surface. This process may be repeated indefinitely. Ordinarily two coats of the powder suffice. When the last has been burnt on the ware is allowed to cool. It is ready for finishing, inspection, cleaning, shipment, and sale.

The patents spoken of in this case are for automatic dredgers. A dredger is used to sprinkle the powdered enamel on the ware. It serves no other purpose. It is not used in making the iron, or the ware out of the iron, or the liquid, or the powdered enamel, nor in the construction, the heating, or operation of the furnace, nor in taking the weighty and red-hot metal out of the furnace and putting it back. In the doing of these things many compositions of matter, machines, tools, appliances, and processes are employed. Upon the well-doing of every one of them the usefulness, the attractiveness, and the durability of the ware depend. Whether any one of them shall be well or ill, cheaply or expensively done turns in greater or less degree upon the fitness and adaptability of the compositions, machines, tools, appliances, and processes used. Any patentable improvement in any one of them would bear the same relation to the ware as is borne by the automatic dredgers. There might be

differences of degree in either direction. In legal theory no distinction would be possible.

From this point of view further inquiry into the precise degree of usefulness of the automatic dredger in the sprinkling step of the enameling process of making the ware might be omitted.

The question of law will be, in any event, whether the owner of a patent on one of many tools used in the making of a particular kind of unpatented ware may lawfully make such agreements with reference to it as those in the record.

This case is, however, one of importance. In certain aspects it is suggested that it is one of first impression. It will be well, therefore, to understand how the enameler would like to sprinkle the powder and to what extent and in what way the automatic dredger helps him to do it as he would. He wants to use little powder. It is more or less costly. The thinner the enamel coat the better the ware looks and lasts. The whole surface of the article must be covered, otherwise it will be almost or altogether useless. The more uniform the coat of enamel is, the more sightly and durable it will be. If little powder is to fully cover the entire surface it must be applied in a finely divided form. Every portion of the surface must receive as nearly as may be precisely the same amount of powder as any other portion of like extent. The sprinkling must therefore be done with great evenness and regularity. It must be done quickly. The powder will not attach itself firmly to the base unless fused upon it. If every minute portion of the surface is to be covered, the powder must melt and run in liquid form the moment it touches the article. The sprinkling must consequently be done and finished while the iron remains hot enough to liquefy the enamel the instant the latter touches the former. For this purpose a minimum temperature of 1,200° F. is required. It is true that if time does not suffice to sprinkle the powder over the entire surface the article may be returned to the furnace and reheated. When taken out again the uncovered portion may be sprinkled. A coat applied in installments does not usually look well to an expert eye. It is costly. So to put it on takes more time and more fuel.

The manufacturer likes the processes used in his factory to be of a kind easy for the workmen to learn and to practice. Labor then costs less both in money and worry.

When makers of enameled ware first wanted to sprinkle powder on iron they set about doing it in the way in which men had for countless centuries been wont to sprinkle powder for other purposes They took an ordinary sieve, dredge, or sifter. It was not unlike in size and shape that with which housewives had for time out of mind sifted flour or meal. The enameler, it was true, could not handle his sifter as his wife handled hers. He could not stand beside the surface he was to cover and with both hands shake the dredge over it. He could not, because that surface was part of a mass of red-hot iron. He must stand back from it. Accordingly, a handle was put on the dredger. He could not shake it as his wife shook hers. Her only object was to reduce the meal to a fine powder. It

made no difference whether more of it fell upon one portion of her board or pan than on another. He must sprinkle his powder uniformly. He could not force it through the meshes by moving the whole dredger and its contents more or less briskly back and fro. He must move it regularly and in one direction. It was not desirable to let it come back on its own tracks. The enameler shook his sieve by tapping upon the handle with a piece of iron. This tapping occupied one of his hands. He had to support and guide the dredger with the other. He had a disagreeable choice to make. If he used a dredge with a short handle he had to stand very near large articles of glowing iron. If he lengthened the handle the weight of the dredger and its contents at the end of so long a lever became too great for his strength.

What he in fact at first did was to use a dredger with a handle 3 or 4 feet long. This brought him very close to the red-hot metal. To partially protect himself from the heat he wore asbestos masks, gauntlets, and breast plates. Even so, he had an uncomfortable job. The heat was always disagreeable. At times it must have been trying. Supporting the dredger with 6 to 8 pounds of powder in it, and moving it steadily, firmly, and accurately over the surface was hard work. Continuously tapping with the other hand was racking to the muscles and nerves, although the force required to give a single tap was doubtless trifling. Not every man was physically able to handle a dredger under such conditions. Few men could have handled it for more than a few minutes at a time. They did not have to. Bathtubs are the largest articles usually made. Defendants' witnesses say that when the short-handled dredger was used it took on an average about four minutes to cover a bathtub with the powder. The same witnesses tell us that an expert enameler could enamel some 11 tubs in a working day of 10 hours. Each tub ordinarily was given two coats of the powdered enamel. An enameler, therefore, in 10 hours went twice over each of 11 tubs; that is, he sprinkled 22 coats in all. It took him 22 times 4 minutes to do it, or 88 minutes in the aggregate. In the ordinary course of his work he handled the dredger for four minutes. He did something else for 23, then took another 4-minute turn with the dredger, and so on throughout the day. It may be that defendants' witnesses have underestimated the number of tubs formerly enameled by a good workman in a single day. Even so, the enameler used the dredger for short intervals only. There were relatively long intermissions when he did not. If it had been otherwise, the incidents related as to the exhaustion and almost collapse of the workmen would have been common and typical instead of being occasional and altogether exceptional, as they doubtless were. Had they been ordinary occurrences, the industry could scarcely have been carried on.

Whether they were or were not frequent is now immaterial. Before the first automatic dredger was invented it had ceased to be necessary for the enameler to stand close to the glowing metal or to support the weight of the dredger and its contents. It had occurred to some one that the handle might be supported from the ceiling. It could easily be balanced by a counterweight. The length of the

handle was no longer limited by the physical strength of the workman. It was made 7 or 8 feet long. The asbestos armor was discarded except upon the arm and hand most exposed. The enameler had no great weight to support. One arm could be devoted solely to guiding the dredger. The other was still necessarily occupied in keeping up a continuous tapping. This form of dredger had come generally, if not universally, into use before the invention of the pneumatic dredger some 12 or 13 years ago. In essence the patented dredgers differ from the unpatented in one respect only. In the former the tapping is done by machinery. In their predecessors it was done by hand. The handle of the patented dredger is made of hollow metal. In it a plunger is fitted. By compressed air or by electricity the plunger is made to keep up a continuous and perfectly steady and uniform tapping. The workman by the pressure of his thumb may at his will increase or decrease the frequency of these tappings or he may stop them altogether. The automatic dredgers were supported in the same way as the unpatented long-handled dredger had been. The enameler who works with one can use both hands to guide the dredger. He has nothing else to do. His work is much simplified and made far easier and more agreeable. The use of both hands gives him a better and a surer control over the motion of the dredger. There is less danger of his putting too much powder in one place and too little in another. Personally he is much more comfortable. He can work faster. At the same time he no longer feels rushed or driven. He knows now that he can put one coat on before the metal cools. Before he was not always, perhaps not usually, sure that he could. As a rule his work is now better done.

The patented dredger was useful in other ways. It could be fitted with a finer mesh. It puts the powder on the metal in a more finely divided form. This, as has been already pointed out, is an advantage. So long as the tapping was done by hand the blows upon the handle would not always be hard enough to force the powder through a mesh as fine as that which may now be used. The powder falls from an automatically tapped dredge with a regularity and uniformity greater than that which can be given to it by the average workman. The use of the patented dredgers may or may not save enameling powder. There is testimony both ways. With such dredgers more work can be done in the same time. Other things being equal, it is probable that ware in the enameling of which they have been used will on the average be somewhat better enameled than it would have been had hand dredgers been employed.

The record does not enable us to tell in either absolute or relative figures or percentages how great is the saving of time or the bettering of quality. The same number of men in the same time now usually turn out more work than they formerly did. In the attainment of this end the patented dredger helps. Other things contribute. Some, but not all, of these other improvements can be used to greater advantage in connection with the automatic than with the hand dredger. How much the use of the patented dredgers improves the quality is still harder to figure out. Some men with fine

tools can not do as good work as other men with poor. The defendants' evidence seems to show that the percentage of ware of high quality turned out depends much more largely upon shop management and efficiency than it does upon the use of one form of dredger rather than another. One of defendants' witnesses says that with the hand dredge his shop made 95 per cent of second and only 5 per cent of first-class goods. With the automatic dredger he gets 25 per cent of seconds and 75 per cent of firsts. This is definite enough. Another witness for the same side, but whose experience has been had in another factory, says that with the old hand dredge he made only 5 per cent of seconds. By the use of the automatic dredger he has brought that proportion down to 1 per cent. If each of these witnesses is even approximately accurate, it follows that one of them with an automatic dredger made five times as large a proportion of inferior goods as did the other when using a hand dredger.

All that can be safely said is that the automatic dredgers are useful tools. By their use, all other things being equal, ware can be made more cheaply and on the whole of a somewhat better average quality. No one claims that he can tell by inspection of a completed article whether the enameling powder was sprinkled upon it with a hand or an automatic dredger. Some of the witnesses think that if they were shown two considerable lots of the ware in the enameling of one of which one kind of dredger had been exclusively used and in that of the other another kind, they could say upon which the powder had been shaken from a hand dredger and upon which from an automatic dredger. It does not appear that the experiment ever has been tried. It is quite probable, nevertheless, that the distinction could frequently be made with reasonable accuracy, provided that the two lots had both been made in the same shop by the same men and under otherwise like conditions, except as to the dredger used. The difference of results attained in different shops, as shown by the record, and the further fact that as soon as the operation of the price restrictions was suspended some of the defendants, although using the automatic dredger exclusively, put large quantities of seconds on the market, seem to show that it is unlikely that anyone could tell upon which of two lots of the ware made in different shops or in the same shop under different conditions the hand dredger had been used and upon which the automatic.

It follows that there is no respect in which every tub in the enameling of which an automatic dredger has been used differs from every tub in the enameling of which the hand dredger has been employed. Whether the ware shall be well or ill made, whether it shall be durable or the reverse, whether it shall be sightly or unsightly, depends upon many circumstances of which the kind of dredger used to sprinkle the powder is only one and probably not the most important. Much turns on the composition of the enamel. Each factory makes it according to its own formula, which it tries to keep secret. Perhaps none of the powders in use give complete satisfaction. Experiments for their bettering are continually being made. How controlling a part the composition of the powder plays is shown by the account given by one of defendants' witnesses

of the disastrous results upon the ware of an experimental change in the powder made since the first of the present year by one factory. The liquid enamel or slush coat must be properly made and fittingly applied. The furnaces must be adapted to the work to be done by them. The appliances for putting the ware into the furnace and for taking it out again must be constructed so that with little consumption of time and labor the work will be done without damaging the delicate enamel not yet firmly fused upon its base. The castings must be well made and of the right kind of metal. It is quite possible that a new tool, appliance, or process may be invented for the better doing of any one of them. Its use may improve the average quality or cheapen the average cost of the ware, or both. Every such an inventor if he obtained a patent for his invention would be as much entitled as Wayman to say at what price and upon what terms men might deal in the finished article in some stage of the making of which his invention had been used.

Defendants say that while it is true that the automatic dredger is a mere tool, used in only one operation of a number required for the making of the ware, and while it is conceded that merchantable ware can be made without its use, still the advantages of using it are so great that as a commercial proposition the ware can not be made without it. It is unnecessary to consider what legal consequences, if any, would follow if the record sustained this claim. It does not. It is true certain witnesses say that in their judgment the automatic dredgers have become necessities for the manufacture of the ware for commercial purposes. The record conclusively demonstrates that they are mistaken. Such concerns as the J. M. Kohler Sons Co. and the Iron City Sanitary Manufacturing Co. have no rights under any of the patents. There is no evidence of their having infringed them. They make and sell the ware in large quantities in competition with the licensed manufacturers. Moreover, if the experience of the concerns which had the right to use the patented dredger had convinced them that the ware could not without their use be made good enough and cheap enough to be sold in competition with them, it is not conceivable that they should have gone to all the trouble they did to induce those two concerns to take licenses. According to the defendants' present theory the refusal to do so was tantamount to commercial suicide. If factories without licenses could not make ware which could be sold in competition with that made by those who had licenses, the fewer who had licenses the better for those who had.

The ware is absolutely unpatented. Anyone may sell it as freely as he may a loaf of bread. No one can tell by looking at a bathtub whether enameled powder has been sprinkled upon it by a patent dredger any more than anyone who eats a loaf of bread can tell whether it has been baked in an oven with a patented grate, or who lights a kerosene lamp can tell whether, in the process of refining, a patented tool has been used, or by taking a pinch of snuff can be sure that there was or not a patented mill used in grinding the tobacco.

If agreements in this case are not violations of the Sherman Act,

similar agreements among all the bakers of bread, the refiners of petroleum, the grinders of snuff will be legal, provided that somewhere in the process of making the bread, refining the petroleum, or grinding the snuff a patented tool has been used.

The issue is important. It cuts deep. The record squarely presents it. It must be passed upon.

The defendants say they have broken no law even if all that has thus far been said herein be true.

They rely upon what they understand to have been decided by the Circuit Court of Appeals of the Seventh Circuit in the case of the Rubber Tire Wheel Co. v. Milwaukee R. W. Co. (154 Fed., 358).

There the court said that no one can use a patented article without the consent of the patentee. He may fix his own conditions. It adds, "Whatever the terms the courts will enforce them, provided only that the licensee is not thereby required to violate some law outside of the patent laws, like the doing of murder or arson.'

The defendants ask, "Is not the legal title to the dredger patents in Wayman?" "May any use the automatic dredgers without his consent?" "May he not make what terms he will for his license to use them?" "Will not the courts enforce those terms, provided they do not call for the violation of some law outside the patent law, like murder or arson?" "Have the defendants committed murder or arson, or anything like either?"

Making a price agreement differs widely in many fundamental respects from either murder or arson. The difference is so profound that it can be easier felt than accurately defined. It is not to be found in the circumstance that almost all races of men have for countless centuries felt that murder and arson were highly immoral acts. It would not be difficult from the text of the criminal codes of many different peoples at widely separated periods of the world's history and from the writings and sayings of ethical and religious teachers of divers creeds and races to argue that for some thousands of years the vast majority of mankind has felt that it was also immoral to make a combination for the purpose of raising the prices of things of general use. At all times there has been a minority of shrewd and able men who have believed that such combinations were merely the reasonable exercise of superior sagacity and foresight. There never has been a time when most men, however much they disliked price agreements in things they bought but did not sell, were not able to persuade themselves that there was nothing wrong in agreeing to keep up the prices of things they sold but did not buy. It is not for us to say what the true ethical relation of the monopolist to the community in which he lives is. In this country those who believe that he is a dangerous wrongdoer, have in lawful manner written their convictions upon the statute book. The Sherman Act forbids restraint of interstate trade and attempts to monopolize it. He who does either may be punished, and that, too, in a way which the legislature seldom directs unless the thing forbidden is felt by the majority of the people to be unethical if not highly immoral.

The use by the Circuit Court of Appeals of the Seventh Circuit of murder and arson as illustrations of breaches of law which a patentee had no greater immunity to commit than had any other man was accurate, natural, and striking. At a glance everyone could see that a patentee could not lawfully require his licensee to commit either. Unfortunately some people have persuaded themselves that those illustrations were intended as limiting the violations of law which a patentee could not require, to crimes which the ordinary man feels to be of the same general type as murder and arson. Such, of course, was not the intention of the court.

A patentee may not require his licensee to sell a patented oil which flashes below the minimum temperature prescribed by State law.

Patterson v. Kentucky (97 U. S., 501).

He may not authorize his licensee to prescribe and sell his patented medicine in a State which requires of all who write prescriptions that they shall have qualifications not possessed by the licensee.

Jordan v. Overseers of Dayton (4 Ohio, 295).

Selling oil with a low-flashing point or prescribing patent medicine without having a State license to practice medicine would no more strike the average man as akin to murder or arson than would a combination to fix prices. In one respect they are like murder and arson. They are violations of law outside the patent laws. So is a combination in restraint of trade. What the court meant was what the court said—a patentee can not require his licensee to violate a law outside of the patent law. Murder and arson are outside the patent law. Every obligation which a patentee attempts to impose upon his licensee to break any law outside of the patent law is in that respect like a requirement to commit murder or arson.

In the nature of things such must be the law. A patentee is as much subject to the laws of the land as is any other man. From one special application of one class of laws he is exempt. At common law and by statute monopolies are unlawful. At common law and by statute a man who invented a new and useful thing might be given a right which would enable him for a limited time effectually to monopolize it. The courts have said that this right to monopolize what he invented can not be taken from a patentee by State laws. They say it has not been taken away by Congress. All men know that Congress never intended, when it passed the Sherman Act, to change the patent law. It did not do so. The patentee may, in spite of that law, monopolize for the term of his patent the thing which he or his assignor invented. Neither at common law nor in this country by statute has he ever had a right to monopolize anything else. As to everything not validly claimed in his patent he is as other men. If by the common law or the statutes of the State or by the enactments of Congress men are forbidden to restrain trade or to monopolize it, a patentee may not restrain trade or attempt to monopolize it in anything except that which is covered by his patent.

A patent is a grant of a right to exclude all others from making, using, or selling the invention covered by it. It does not give a right to the patentee to sell indulgences to violate the law of the land, be it the Sherman Act or another.

The right to exclude others is the property of the patentee. It is his very own. He may do with it as he will. A very rich man may have $100,000,000 of cash. It is his property. It is his very own. He may do with it as he will. Neither one of them can use his property to bring about a violation of law. A patentee who monopolizes his invention breaks no law. He who uses his property right to exclude others from the making, selling, or using his invention for the purpose and with the effect of making a combination to restrain trade in something from which his patent gives him no right to exclude others, does break the law. He breaks it precisely as the individual defendants in the Standard Oil and American Tobacco Cos. broke it. They had the same right to use their brains, their capital, and their credit as they thought best, as he had to use his right to exclude all others from making, using, or selling automatic dredgers. He was subject to the same limitations as they were. They could not lawfully use their brains, their money, and their credit to restrain trade in petroleum and tobacco. He can not use his patent rights to restrain trade in unpatented bathtubs.

The defendants have pressed upon our attention many cases in the Circuit Courts and in the Circuit Courts of Appeal. Many of them have upheld the right of a patentee to fix the price below which a purchaser from him of patented articles may not sell those articles. In some of these cases it has been held that one who sells at a lower price thereby becomes an infringer and that the Federal courts have jurisdiction of a suit brought against him on account of such sale, irrespective of the amount in controversy or the citizenship of the parties.

Edison Phonograph Co. v. Kaufman (105 Fed., 960).
Edison Phonograph Co. v. Pike (116 Fed., 863).
Victor Talking Machine Co. v. The Fair (123 Fed., 424).
National Phonograph Co. v. Schlegel (128 Fed., 733).
New Jersey Patent Co. v. Schaefer (144 Fed., 437; 159 Fed., 171).
Rubber Tire Wheel Co. v. Milwaukee R. W. Co. (154 Fed., 358).
Goshen Rubber Works v. Single Tube A. & B. Tire Co. (166 Fed., 431).

The Supreme Court has in several recent cases expressly said that it was not to be understood as expressing any opinion as to whether such restrictions when applied to patented articles were or were not valid.

Dr. Miles Medical Co. v. John D. Park & Sons Co. (220 U. S., 373).
Bobbs-Merrill Co. v. Straus (210 U. S., 339).

Wayman did not sell patented dredgers on condition that the purchasers should not resell them below a fixed price. The question

of whether such restrictions upon the sale of patented articles are valid is not before us. We neither decide it nor intimate any opinion upon it.

In a number of cases the owner of a machine patent has licensed others to use the machine on condition that they would buy certain unpatented things upon which the machine operated exclusively from the patentee. Those conditions have been held valid by a number of courts. Persons who with knowledge of the terms of the license have sold to the licensee some of the unpatented things to be used on the patented machine have been held liable for contributory infringement.

Heaton Peninsular Button Fastening Co. v. Eureka Specialty Co. (77 Fed., 288).
Rupp, Wittgenfeld Co. v. Elliott (131 Fed., 730).
A. B. Dick Co. v. Henry (149 Fed., 424).
Aeolian Co. v. Harry H. Juelg Co. (155 Fed., 119).
Crown Cork & Seal Co. v. Brooklyn Bottle Stopper Co. (172 Fed., 225).
Crown Cork & Seal Co. v. Standard Brewery (174 Fed., 252).

In the case of Cortelyou v. Johnson (145 Fed., 933) the majority of the Circuit Court of Appeals for the Second Circuit declined to hold that a third person who, with knowledge of the restriction, sold to a licensee ordinary articles of commerce to be used upon the licensed machine was a contributory infringer. All the judges held that in the particular case there was not sufficient evidence that the defendant made the sales with knowledge as to the terms of the license and the use to be made of the ink. The Supreme Court affirmed the decision below on the ground of want of sufficient evidence of notice. It expressly refused to express any opinion as to whether the defendant could have been held had notice been shown.

Cortelyou v. Johnson (207 U. S., 196).

A patentee may or may not be entitled to obtain his pay for his patented machine in whole or in part by stipulating that he shall have the sole right to furnish material to be used with it. We express no opinion upon the question. It would have been presented in this case had Wayman bargained with the corporate defendants that they should buy all their enameling powder from him. Such a bargain would have been a very different one from that now before us. The purposes aimed at by such a bargain, the relations among the defendants and between them and the public would have all been unlike those shown in the record.

What has been said is sufficient for the determination of this case. The ware is not patented. The agreements or licenses attempt to fix the price of unpatented ware and to monopolize the trade in it. The fact that Wayman had a patent on something else, even though it was a tool used in one step of the making of the ware, gives neither him nor his licensees the right to restrain interstate trade in the ware. The ownership of a patent for a tool by which old, well-known, and unpatented articles of general use can be more cheaply made gives no right to combine the makers and dealers in

the unpatented articles in an agreement to make the public pay more for it.

The first and second sections of the Sherman Act, "when taken together, embraced every conceivable act which could possibly come within the spirit or purpose of the prohibitions of the law without regard to the garb in which such acts were clothed. * * * In view of the general language of the statute and of the public policy which it manifested, there was no possibility of frustrating that policy by resorting to any disguise or subterfuge of form, since resort to reason rendered it impossible to escape by any indirection the prohibitions of the statute."

United States v. American Tobacco Co. (221 U. S., 181).

In what has been said it has been assumed that Wayman was the real and substantial owner of the patents; that the scheme was his; that his purpose was merely to make money for himself by selling to the corporate defendants indulgences to sin against the Sherman Act.

The Government contends that this was not the real situation. In its view there is nothing before the court except an ordinary combination to raise and maintain wholesale and retail prices and to force all the makers and dealers in the country into it. Wayman, it says, was nothing more than the ordinary promoter. The patents served the purpose of the certificate of incorporation from New Jersey or Delaware used when the combination became a consolidation. We have not discussed this branch of the case. We will not. We refrain from doing so not because it would not be pertinent. It would. Ordinarily it would receive full consideration. Unusual circumstances shown by the record make it inexpedient and even improper to do so if the case can be disposed of without commenting upon that aspect of it.

Some months after these proceedings were begun the grand jury of the United States for the Eastern District of Michigan returned indictments against many of the defendants. They were charged with violating the Sherman law. The acts alleged against them there are the same which are made the ground of the equitable relief here asked for.

The defendants have moved that further proceeding herein be put off until the criminal case has been finally disposed of and that the taking of testimony be then reopened. It is said that the individual defendants should in justice to themselves testify fully and freely. It is said that this they dare not now do. They fear that something to which they swear in the civil proceeding may be used in the criminal to their hurt. This motion we can not grant. The Sherman Act provides for both civil and criminal proceedings. The Attorney General must decide whether and when either or both shall be brought. To postpone finding an indictment until after a petition for an injunction had upon final hearing been granted or dismissed would be frequently, if not usually, to wait until after the period of limitations had expired. To refuse to decide the equity cause so long as the criminal charge had not been finally disposed of might leave the public to suffer for years from what the Attorney

General believed to be a harmful interference with its rights and interests. The courts can not, unless in exceptional cases, say that either must wait upon the other. A court of equity has a wide discretion. There may be circumstances which would justify its refusal finally to act until after the indictments had been tried. In our view such circumstances are not found here.

The fact that many of the defendants are now under indictment makes it our duty to be careful not to say anything which might be used either to their prejudice or to that of the Government in the impending criminal trial.

Some minor questions affecting particular defendants are to be passed upon.

The Colwell Lead Co. says it is not engaged in interstate commerce. In our view it is. It makes its ware in New Jersey. It sends it to warerooms in New York City and in Worcester, Mass., and there sells it. Its trade extends over several States. It alleges that it had no part in any of the negotiations leading up to the formation of the scheme; that it did not execute a license agreement until some three weeks after the other corporate defendants, and that then it refused to bind itself to charge the resale prices. It was consulted through its president sometime before any of the agreements were actually entered into or before their precise terms were definitely settled. He then gave a general approval of the plan. Neither he nor it appear to have done anything further until after the others had signed up.

Some months before, the Standard Sanitary Manufacturing Company, which, until May 4, 1910, owned the basic automatic patent, had given the Colwell Co. a revocable license to use the dredger. The latter wanted Wayman to renew the license. It apparently did not want it badly enough to be willing to bind itself to charge the uniform resale prices to the New York City plumbers, to whom it sold a large part of the ware. Wayman finally agreed in writing that if it would take a license he would try to get from the commission of the corporate defendants leave to cut those prices whenever it found that maintaining them would seriously handicap it. If the commission would not let the Colwell Lead Co. do so, the latter on 10 days' notice could terminate the agreement. It would appear that it became a party to the combination to an extent sufficient to entitle the Government to injunctive relief against it.

The evidence shows that two of the individual defendants, namely, Bert O. Tilden and George W. Franzheim, secretaries of the Colwell Lead and the Wheeling Enameled Iron Cos., respectively, had no part in forming the combination. They did not do anything in connection with it except to attest in their official characters papers executed by their corporations. As to them the petition should be dismissed. Against the other defendants, corporate and individual, the Government is entitled to injunctive relief substantially as prayed for. In view of the pendency of the criminal case all characterization of what the defendants have done not necessary to the effectiveness of the decree should be omitted from it. The Government may submit a draft of a decree to the counsel for the defendants. If an agree-

ment can not be speedily had we will upon application fix an early day for its settlement.

GOFF, *Circuit Judge*, dissenting:

I can not assent to the conclusion reached by the court in this opinion. The facts established by the testimony, considered in the light of the law applicable thereto, compel me to conclude that the allegations of the petition have not been sustained.

Decree.

Filed November 27, 1911.

In the Circuit Court of the United States for the District of Maryland. In Equity.

THE UNITED STATES OF AMERICA, Petitioner,

v.

STANDARD SANITARY MANUFACTURING COMPANY, A. WEISKITTEL & Company, The Barnes Manufacturing Company, The Cahill Iron Works, Colwell Lead Company, The Day-Ward Company, The Humphreys Manufacturing Company, Kerner Manufacturing Company, The J. L. Mott Iron Works, McVay & Walker, The McCrum-Howell Company, The National Sanitary Manufacturing Company, Union Sanitary Manufacturing Company, United States Sanitary Manufacturing Company, L. Wolff Manufacturing Company, Wheeling Enameled Iron Company, Theodore Ahrens, Francis J. Torrance, E. L. Dawes, W. A. Myler, Anton Weiskittel, John D. Heise, C. H. Voegele, T. R. Barnes, F. H. Caldwell, J. J. Mahoney, Jesse T. Durvea, Bert O. Tilden, W. C. Winfield, A. G. Ward, S. N. Ford, Reid Carpenter, J. A. Frauenheim, Jordan L. Mott, Max Goebel, Thomas Walker, Alexander C. Walker, Lloyd G. McCrum, Howard T. Gates, Frank G. Borden, D. W. Davis, L. C. Hue-man, E. V. Brigham, Charles Arrott, A. H. Cline, Jr., Herman Hoelscher, J. E. Wright, George W. Franzheim, Edwin L. Wayman, Defendants.

Before Goff and Pritchard, Circuit Judges, and Rose, District Judge.

Decree.

This cause came on to be heard at this term, and was argued by counsel; and thereupon, upon consideration thereof, it is by the court, Judges Pritchard and Rose concurring, and Judge Goff dissenting, ordered, adjudged, and decreed:—

First. That each of the defendants, Bert O. Tilden and George W. Franzheim, in his official character as secretary of his respective corporation, defendant herein, attested the contracts hereinafter mentioned, executed by such respective corporation, and had no other connection therewith, and that the original petition of the United States herein be and hereby is dismissed as to the defendants, Bert O. Tilden and George W. Franzheim, with costs to each of them to be taxed.

Second. That the defendants (other than those against whom the petition is dismissed, and Ludwig Wolff, who died before the final

hearing), in the manner set forth in the petition, have entered into and are engaging in a combination in restraint of trade and commerce among the several States in sanitary enameled ironware and have attempted and are attempting to monopolize said trade and commerce in said ware, in violation of the act of Congress approved July 2, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies."

Third. That upon the evidence the defendant Colwell Lead Company is engaged in inter-state commerce within the meaning of the act of Congress approved July 2, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies."

Fourth. That the so-called manufacturers' license agreements and the jobbers' license agreements, and the price lists made part of said agreements, all described in the petition herein, have been and are the means adopted and used by the defendants in order to carry into effect the objects and purposes of said unlawful combination in restraint of said interstate trade and commerce in violation of said act of Congress, and that the said agreements and price lists are therefore hereby declared illegal and the defendants and all and each of them and their officers, agents, servants, and employees are enjoined and prohibited from doing anything in furtherance of said manufacturers' license agreements and jobbers' license agreements, and from enforcing in any manner said agreements or any of the terms thereof, and from adopting or enforcing said price lists in interstate commerce in sanitary enameled ironware.

Fifth. That the defendants, their officers, agents, servants, and employees, are enjoined and prohibited from continuing their attempt to monopolize inter-state commerce in said ware by means of the unlawful combination hereinbefore described, and more particularly by means of said manufacturers' license agreements and jobbers' license agreements, and said price lists, or by any other means similar thereto.

Sixth. That the said defendants, their officers, directors, agents, servants, and employees, are enjoined and prohibited from resuming, engaging in, continuing, or carrying into further effect the combination adjudged illegal hereby, and from engaging in or entering into any like combination or attempt to monopolize, the effect of which will be to restrain commerce in sanitary enameled ironware among the several States of the United States, or in the Territories of the United States, by making any express or implied agreement or arrangement together, or one with another, like that adjudged illegal herein, relative to the control or management of the business of the said defendants in sanitary enameled ironware, the effect of which will be to prevent each and any of them from carrying on interstate trade and commerce in sanitary enameled ironware in competition with the others.

Seventh. That this decree shall not be construed to prevent whoever may be the owner or owners of the Arrott patent and other dredger patents relating to the manufacture of sanitary enameled ironware, from granting lawful licenses to any of the defendants or others to use such patents, or to prevent the defendants or others from taking lawful licenses to use any of such patents.

Eighth. It appearing to the court that on the twentieth day of January, 1911, the defendants, Cahill Iron Works, Frank H. Caldwell and John J. Mahoney, by leave of the court, filed their substituted and amended answer in the cause, showing that theretofore, to wit, on the 17th day of December, 1910, they withdrew from said combination and ceased thereafter to engage in any of the practices complained of in the petition, and submitting to a decree such as is herein decreed, it is further adjudged and decreed that the petitioner recover of said defendants one-sixteenth of its lawful costs which accrued in the cause up to the closing of the case of the petitioner on December 22nd, 1910, and that the petitioner recover of the other defendants, except said Bert A. Tilden and George W. Franzheim, and Ludwig Wolff, the remainder of its lawful costs in this cause.

Nov. 25th, 1911.

J. C. PRITCHARD,
U. S. Circuit Judge.
JOHN C. ROSE.
District Judge.

Petition of Defendants for Appeal and Order of Court Thereon Allowing Appeal.

Filed January 18, 1912.

In the District Court of the United States for the District of Maryland.

In Equity. No. 17.

UNITED STATES OF AMERICA, Petitioner,
against
STANDARD SANITARY MANUFACTURING COMPANY, A. WEISKITTEL & Company, The Barnes Manufacturing Company, The Cahill Iron Works, Colwell Lead Company, The Day-Ward Company, The Humphryes Manufacturing Company, Kerner Manufacturing Company, The J. L. Mott Iron Works, McVay & Walker, The McCrum-Howell Company, The National Sanitary Manufacturing Company, Union Sanitary Manufacturing Company, United States Sanitary Manufacturing Company, L. Wolff Manufacturing Company, Wheeling Enameled Iron Company, Theodore Ahrens, Francis J. Torrance, E. L. Dawes, W. A. Myler, Anton Weiskittel, John D. Heise, C. H. Voegele, T. R. Barnes, F. H. Caldwell, J. J. Mahoney, Jesse T. Durvea, Bert O. Tilden, W. C. Winfield, A. G. Ward, S. N. Ford, Reid Carpenter, J. A. Frauenheim, Jordan L. Mott, Max Goebel, Thomas Walker, Alexander C. Walker, Lloyd G. McCrum, Howard T. Gates, Frank G. Borden, D. W. Davis, L. C. Huesman, E. V. Brigham, Charles Arrott, A. H. Cline, Jr., Herman Hoelscher, J. E. Wright, George W. Franzheim, Edwin L. Wayman, Defendants.

Pending in the Circuit Court at the Time Such Court was Abolished.

The above named defendants Standard Sanitary Manufacturing Company, The Barnes Manufacturing Company, Colwell Lead

Company, The Humphryes Manufacturing Company, The J. L. Mott Iron Works, McVay & Walker, The McCrum-Howell Company, National Sanitary Manufacturing Company, Union Sanitary Manufacturing Company, L. Wolff Manufacturing Company, Wheeling Enameled Iron Company, A. Weiskittel & Company, Theodore Ahrens, Francis J. Torrance, E. L. Dawes, W. A. Myler, C. H. Voegele, T. R. Barnes, Jesse T. Duryea, S. N. Ford, Reid Carpenter, Jordan L. Mott, Max Goebel, Thomas Walker, Alexander C. Walker, Lloyd G. McCrum, Howard T. Gates, Frank G. Borden, D. W. Davis, L. C. Huesman, E. V. Brigham, Herman Hoelscher, J. E. Wright, Anton Weiskittel, John D. Heise, and Edwin L. Wayman, conceiving themselves aggrieved by the decree made and entered on the 25th day of November, 1911, in the above entitled cause, do hereby appeal from said order and decree to the Supreme Court of the United States, for the reasons specified in the Assignment of Errors, which is filed herewith, and pray that this appeal may be allowed, and that a transcript of the record, proceedings, and papers upon which said order and decree were made, duly authenticated, may be sent to the Supreme Court of the United States.

J. R. CAREY,
Solicitor for National Sanitary Mfg. Co., Frank G. Borden, & D. W. Davis.
HERBERT B. HONEYMAN,
Solicitor for Colwell Lead Co. & Jesse T. Duryea.
MARBURY, GOSNELL & WILLIAMS &
NOBLE, JACKSON & HUBBARD,
Solicitors for Appellants Other Than Those Named.
LEWIS BRUCKER,
Solicitor for Barnes Manufacturing Co., T. R. Barnes, & C. H. Voegele, Humphreys Manufacturing Co., S. N. Ford, & Reid Carpenter.
RUSSELL T. MACFALL &
FERDINAND WINTER,
Solicitors for Union Sanitary Mfg. Co., L. C. Huesman, & E. V. Brigham.

Dated this 18th day of January, 1912.

Appeal allowed as prayed and bond fixed at $5000 to act as supersedeas as to costs.

Dated, Baltimore, Md., January 18, 1912.

JOHN C. ROSE,
U. S. Judge.

Assignment of Errors.

Filed January 18, 1912.

In the District Court of the United States for the District of Maryland.

In Equity. No. 17.

UNITED STATES OF AMERICA, Petitioner,
against
STANDARD SANITARY MANUFACTURING COMPANY and Others,
Defendants.

Pending in the Circuit Court at the Time Such Court was Abolished.

The defendants Standard Sanitary Manufacturing Company, The Barnes Manufacturing Company, Colwell Lead Company, The Humphryes Manufacturing Company, The J. L. Mott Iron Works, McVay & Walker, The McCrum-Howell Company, National Sanitary Manufacturing Company, Union Sanitary Manufacturing Company, L. Wolff Manufacturing Company, Wheeling Enameled Iron Company, A. Weiskittel & Company, Theodore Ahrens, Francis J. Torrance, E. L. Dawes, W. A. Myler, C. H. Voegele, T. R. Barnes, Jesse T. Duryea, S. N. Ford, Reid Carpenter, Jordan L. Mott, Max Goebel, Thomas Walker, Alexander C. Walker, Lloyd G. McCrum, Howard T. Gates, Frank G. Borden, D. W. Davis, L. C. Huesman, E. V. Brigham, Herman Hoelscher, J. E. Wright, Anton Weiskittel, John D. Heise, and Edwin L. Wayman, pray an appeal from the final decree of the Circuit Court to the Supreme Court of the United States, and make the following assignments of error.

The Court erred:

First. Because, as appears from the record in this cause, the Petitioner was not entitled to the injunction granted in said decree, and its application for the same should have been refused.

Second. Because, as appears from the record in this cause, neither of the defendants named, nor their agents, servants, or attorneys, in the manner set forth in the petition, or otherwise, entered into or engaged in a combination in restraint of trade and commerce among the several States in sanitary enameled iron-ware, or attempted to monopolize said trade and commerce in said ware in violation of the Act of Congress approved July 2, 1890, entitled: "An Act to protect trade and commerce against unlawful restraints and monopolies" or otherwise.

Third. Because, as appears from the record in this cause, the defendant Colwell Lead Company was not engaged in interstate commerce within the meaning of the Act of Congress approved July 2, 1890, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies."

Fourth. Because, as appears from the record in this cause, the manufacturers' license agreements and the jobbers' license agreements, and the price lists made part of said agreements, all described

in the petition in this cause, were not means adopted and used by the defendants in order to carry into effect the objects and purposes of any unlawful combination in restraint of said interstate trade and commerce in violation of said Act of Congress, and said agreements and price lists were legal and the Petitioner was not entitled to an injunction enjoining the defendants and all and each of them, and their officers, agents, servants, and employees from doing anything in furtherance of said manufacturers' license agreements and jobbers' license agreements, and from enforcing said agreements or any of the terms thereof, and from adopting and enforcing said price lists in interstate commerce in sanitary enameled iron-ware.

Fifth. Because, as appears from the record in this cause, the Petitioner was not entitled to the injunction granted in said decree enjoining and prohibiting the defendants, their officers, directors, agents, servants, and employees from continuing the combination described in this cause in interstate commerce in said ware, and more particularly in said manufacturers' license agreements and jobbers' license agreements, and said price lists, or by any other means similar thereto.

Sixth. Because, as appears from the record in this cause, the Petitioner was not entitled to the injunction granted in said decree enjoining and prohibiting the defendants, their officers, directors, agents, servants, and employees from resuming, engaging in, continuing, or carrying into further effect the combination described in this cause, and from engaging in, or entering into any like combination, or by making any express or implied agreements or arrangements together, or one with another, like that described in this cause relative to the control or management of the business of said defendants in sanitary enameled iron-ware.

Seventh. In holding that the manufacturers' license agreements, the jobbers' license agreements, and the price lists made a part of said agreements, all described in the petition in this cause, were illegal and void.

Eighth. In holding that the manufacturers' license agreements, the jobbers' license agreements, and the price lists made a part of said agreements, all described in the petition in this cause, were not legal under the patent laws of the United States.

Ninth. In not holding that the manufacturers' license agreements, the jobbers' license agreements, and the price lists made a part of said agreements, all described in the petition in this cause, were legal under the patent laws of the United States.

Tenth. In holding that the defendant Wayman, as owner of the patents described in this cause, could not legally under the patent laws of the United States make with the corporate defendants the manufacturers' license agreements, the jobbers' license agreements, and establish the price lists made a part of said agreements, with regard to sanitary enameled iron-ware made by the use of the inventions covered by said patents.

Eleventh. In not holding that the defendant Wayman induced the several defendants to enter into the manufacturers' license agreements and the jobbers' license agreements, and to adopt the price

lists made a part of said agreements, all described in the petition in this cause, for the purpose of exploiting the inventions covered by the patents mentioned in the petition in this cause, and in order to increase the royalties to be derived by him from the use of said invention.

Twelfth. In holding that the owner of patents could not legally under the patent laws fix the price and prescribe the terms and conditions under which the product of the use of the inventions covered by said Letters Patent could be sold.

Thirteenth. In holding that the owner of patents could not legally under the patent laws fix the price and *describe* the terms and conditions under which the product of the use of the inventions covered by said Letters Patent could be resold.

Fourteenth. In holding that the agreements described in the petition in this cause were illegal and in violation of the Act of Congress approved July 2, 1890, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies."

Fifteenth. In holding that the defendants entered into a combination in restraint of trade and commerce among the several States in sanitary enameled iron-ware in violation of the Act of Congress approved July 2, 1890, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies."

Sixteenth. In holding that the defendants attempted to monopolize trade and commerce among the several States in sanitary enameled iron-ware in violation of the Act of Congress approved July 2, 1890, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies."

Seventeenth. In holding that the manufacturers' license agreements, the jobbers' license agreements, and the price lists made a part of said agreements, all described in the petition in this cause, were means adopted and used by the defendants in order to carry into effect the objects and purposes of an unlawful combination in restraint of trade and commerce among the several States in sanitary enameled iron-ware in violation of the Act of Congress approved July 2, 1890, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies."

Eighteenth. In holding that the manufacturers' license agreements, the jobbers' license agreements, and the price lists made a part of said agreements, all described in the petition in this cause, were means adopted and used by the defendants in order to carry into effect the objects and purposes of an attempt to monopolize trade and commerce among the several States in sanitary enameled iron-ware in violation of the Act of Congress approved July 2, 1890, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies."

Nineteenth. In not holding that the manufacturers' license agreements, the jobbers' license agreements, and the price lists made a part of said agreements, all described in the petition in this cause, were not subject to the provisions of the Act of Congress, approved July 2, 1890, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies."

Twentieth. Because the record showed that the defendants acted in good faith in entering into the manufacturers' license agreements, the jobbers' license agreements, and in adopting the price lists made a part of said agreements, all described in the petition in this cause, believing them to be legal under the patent laws of the United States,

Twenty-first. Because the record showed that the manufacturers' license agreements, the jobbers' license agreements and the price lists made a part of said agreements, all described in the petition in this cause, were entered into by the defendants for the purpose of improving the conditions of the business in sanitary enameled iron-ware, and the result was, without increasing the price, to improve the quality of the ware, to prevent unfair competition, and to establish the business upon a better and surer basis, and was not in any respect to coerce or compel those not parties to the agreements to cease dealing in sanitary enameled iron-ware or to prevent competition among dealers in the same.

Twenty-second. In holding that the agreements mentioned in the petition in this cause, and particularly those embodied in the manufacturers' license agreements, the jobbers' license agreements, and the price lists made a part of said agreements, all described in the petition in this cause, were price agreements pure and simple, and as such illegal.

Twenty-third. In holding that price agreements pure and simple are always illegal, without regard to whether the prices fixed are reasonable or unreasonable, or whether they tend to restrain interstate trade or commerce, or to stifle competition, or whether they tend to render business more stable and enable manufacturers, jobbers and retailers to conduct business at a reasonable profit upon the reasonable expense of production, handling and sale.

Twenty-fourth. In holding that the manufacturers' license agreements, the jobbers' license agreements, and the price lists made a part of said agreements, all described in the petition in this cause, could not legally be made by the defendant Wayman in so far as such contracts attempted to control and fix the prices and resale prices at which unpatented enameled ware made by the use of the inventions covered by the patents referred to in said petition should be sold, though enameled ware made by the use of such inventions was smoother, evener, thinner, and more durable, the ware of better quality, and the workmen could do more work in the same time, under better conditions, of better quality, and at less cost to the manufacturer.

Twenty-fifth. In holding that the owner of patents could not legally make contracts controlling and fixing the prices and resale prices of the product of the use of the inventions covered by the patents, though the articles made by the use of such inventions were of better quality, could be produced at less cost and under better conditions, and the prices fixed were reasonable.

Twenty-fifth (*a*). Because it appears from the record in this cause that the agreements referred to in the petition were entered into by the defendants primarily for the purpose and with the effect of preventing the manufacture of inferior and defective articles of sanitary

enameled iron ware which on account of their similarity of appearance were often sold as sound articles, thereby eliminating unfair competition in such ware, improving the reputation of the ware, preventing the substitution for the ware of other articles of similar character and for similar purposes, promoting the trade in said ware and enhancing the value of the patent; and any resulting restraint of trade, if any, and any restriction of competition, if any, was merely incidental to said primary purpose and effect and was more than compensated for in the benefit to the public by the stimulation of competition among manufacturers of said ware in the quality of the product, each manufacturer being by virtue thereof relieved of the temptation to manufacture and sell inferior goods because compelled in order to retain his rights under the patents and his share of the trade to turn out the best pos-ibly product at the price fixed, said price so fixed being reasonable.

Twenty-fifth (*b*). Because it appears from the record in this cause that the agreements referred to in the petition were entered into by the defendants primarily for the purpose and with the effect of preventing the manufacture and sale of inferior goods, of compelling the manufacture and sale of first class goods, of enhancing the reputation of sanitary enamelled iron ware and the value of the patents, of preventing the substitution of articles of similar character and used for similar purposes for such ware, of promoting the trade in said ware and for the benefit of the parties to said agreements and the public; and the restraint of trade, if any, and the restriction of competition, if any, were more than compensated for by the benefits derived from the stimulation of competition among the manufacturers of said ware in improving the quality of their product and the incentive given each manufacturer to turn out the best possible product at the price fixed, which price was reasonable.

Twenty-fifth (*c*). Because it appears from the record in this cause that the agreements referred to in the petition were entered into by the defendants primarily for the purpose and with the effect of preventing unfair competition in sanitary enamelled iron ware, of improving the quality of said ware, of enhancing its reputation and the value of the patents and of promoting the trade in such ware by preventing the substitution of other articles therefor; and the restraint of trade, if any, and the restriction of competition, if any, was merely incidental to said primary purpose and effect.

Twenty-sixth. In not holding that the agreements described in the petition in this cause, and particularly the manufacturers' license agreements, the jobbers' license agreements, and the price lists made a part of said agreements, all described in the petition in this cause, were reasonable and enabled the manufacturers to improve the quality of sanitary enameled iron-ware, and the prices fixed were reasonable and yielded only a reasonable profit over the reasonable expense of production, handling and sale.

Twenty-seventh. In holding that the motion of the defendants that further proceedings in this cause be postponed until the criminal proceedings pending in the District Court for the Eastern District of Michigan against these same defendants have been finally dis-

posed of and that the taking of testimony be reopened, could not be granted.

Twenty-eighth. In overruling the defendants' application for leave to take further testimony.

Twenty-ninth. In not holding that the petitioner was not entitled to a decree in this cause while pressing the criminal prosecution against the defendants on account of the same transactions on account of which the decree in this cause was asked.

Thirtieth. In holding that this cause was ripe for decree in view of the fact that the petitioner was pressing the criminal prosecution against the defendants for the same transactions on account of which the decree in this cause was asked, and at the same time preventing the defendants from testifying in their own defense in this cause as to material matters by threatening if they did so to use said testimony against them at the trial of said criminal prosecution.

Thirty-first. In not holding that the individual defendants were made parties to this cause merely for the purpose of discovery and should not be included in any injunction order or decree.

Thirty-second. In not dismissing the said petition as to the individual defendants on the ground that they were merely joined for purposes of discovery.

Thirty-third. In not dismissing the said petition so far as the order for injunction was involved as to said individual defendants on the ground that they were merely joined for purposes of discovery.

Thirty-fourth. In not dismissing the said petition on the ground that the facts established by the testimony do not sustain the allegations of the petition.

Thirty-fifth. In awarding costs to the petitioner and against the defendants.

Wherefore, in order that the foregoing Assignments of Error may be and appear of record, defendants present the same to the Court and pray that such disposition be made thereof as is in accordance with law and the statutes of the United States in such cases made and provided, and said defendants, and each of them, pray for a reversal of said decretal order, and that an order be entered dismissing said petition as to each and every of them.

J. R. CAREY,
Solicitor for National Sanitary Mfg. Co., Frank G. Borden, & D. W. Davis.
RUSSELL T. MacFAUL &
FERDINAND WINTER,
Solicitors for Union Sanitary Mfg. Co., L. C. Huesman, & E. V. Brigham.
ROBERT B. HONEYMAN,
Solicitor for Colwell Lead Co., & Jesse T. Duryea.
LEWIS BRUCKER,
Solicitor for Barnes Mfg. Co., T. R. Barnes, & C. H. Vogele, Humphreys Mfg. Co., S. N. Ford, & Reid Carpenter.
MARBURY, GOSNELL & WILLIAMS,
NOBLE, JACKSON & HUBBARD,
Solicitors for Appellants Other Than Those Named.

Appeal Bond.

Filed January 18, 1912.

Know all men by these presents, That the Maryland Casualty Company is held and firmly bound unto the United States of America in the full and just sum of Five Thousand ($5,000.00) dollars, to be paid to the said the United States of America, to which payment, well and truly to be made, it binds itself, its successors and assigns by these presents.

Sealed with its seal and dated this eighteenth day of January, in the year of our Lord one thousand nine hundred and twelve.

Whereas, lately at a term of the late Circuit Court of the United States for the District of Maryland in a suit depending in said Court, between the United States of America and the Standard Sanitary Manufacturing Company and others, a decree was rendered Nov. 25th 1911, against the said defendants for an injunction and costs and the said defendants having obtained an appeal to reverse the decree in the aforesaid suit, and a citation directed to the said the United States of America citing and admonishing it to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date thereof.

Now, the condition of the above obligation is such, That if the said defendants shall prosecute said appeal to effect, and answer all damages and costs of the Court below and of the Supreme Court if they fail to make said plea good, then the above obligation to be void; else to remain in full force and virtue; said decree as to the costs to be superseded by this bond.

MARYLAND CASUALTY COMPANY,
By JNO. T. STONE, *President.*

[Corporate Seal M. C. Co.]

Attest:

JAS. F. MITCHELL, *Secretary.*

Approved by—

JOHN C. ROSE,
District Judge.

UNITED STATES OF AMERICA, *ss:*

To the United States of America, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to an appeal granted to certain of the defendants from the decree rendered November 25, 1911, in a proceeding in equity in the late U. S. Circuit Court for the District of Maryland, No. 17, wherein the Standard Sanitary Manufacturing

Company and others are appellants and you are appellee, to show cause, if any there be, why the decree rendered against the said appellants as in the said appeal mentioned, should not be reversed, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable John C. Rose, Judge of the District Court of the United States for the District of Maryland, this 18th day of January, in the year of our Lord one thousand nine hundred and twelve.

JOHN C. ROSE,
District Judge.

[Endorsed:] Service of a copy of the within citation is hereby admitted this 18th day of January 1912. John Philip Hill, U. S. Dist. Att'y, District of Md.

Stipulation of Counsel as to Making up Record on Appeal.

Filed February 14, 1912.

In the District Court of the United States for the District of Maryland.

In Equity. No. 17.

UNITED STATES OF AMERICA, Petitioner,
against
STANDARD SANITARY MANUFACTURING COMPANY, A. WEISKITTEL & Company, The Barnes Manufacturing Company, The Cahill Iron Works, Colwell Lead Company, The Day-Ward Company, The Humphryes Manufacturing Company, Kerner Manufacturing Company, The J. L. Mott Iron Works, McVay & Walker, The McCrum-Howell Company, The National Sanitary Manufacturing Company, Union Sanitary Manufacturing Company, United States Sanitary Manufacturing Company, L. Wolff Manufacturing Company, Wheeling Enameled Iron Company, Theodore Ahrens, Francis J. Torrance, E. L. Dawes, W. A. Myler, Anton Weiskittel, John D. Heise, C. H. Voegele, T. R. Barnes, F. H. Caldwell, J. J. Mahoney, Jesse T. Duryea, Bert O. Tilden, W. C. Winfield, A. G. Ward, S. N. Ford, Reid Carpenter, J. A. Frauenheim, Jordan L. Mott, Max Goebel, Thomas Walker, Alexander C. Walker, Lloyd G. McCrum, Howard T. Gates, Frank G. Borden, D. W. Davis, L. C. Huesman, E. V. Brigham, Charles Arrott, A. H. Cline, Jr., Herman Hoelscher, J. E. Wright, George W. Franzheim, Edwin L. Wayman, Defendants.

Pending in the Circuit Court of the United States at the Time Such Court was Abolished.

It is stipulated and agreed by and between the parties to the above entitled case, that the following be incorporated in and constitute the transcript of record on appeal to the Supreme Court of the United States in said case, viz:

1. Petition for Injunction with exhibits attached.

2. Answer of defendant Edwin L. Wayman.

3. Answer of Standard Sanitary Manufacturing Company and others.

4. Answer of A. Weiskittel & Son Company and others.

5. Replication to answer of Edwin L. Wayman.

6. Replication to answer of Standard Sanitary Manufacturing Company and others.

7. Replication to answer of A. Weiskittel & Son Company and others.

8. Separate answer of Colwell Lead Company, et al.

9. Depositions and exhibits contained in printed volumes 1, 2, 3 and 4, used at the hearing in the Circuit Court.

10. Expediting certificate of the Attorney General.

11. Order designating the Honorable John C. Rose to sit with the Circuit Judges on the hearing of this case.

12. Motion for enlargement of time to take testimony.

13. Opinion of the Court.

14. Decree.

15. Petition for allowance of appeal and Order of Court granting same.

16. Assignment of Errors.

17. Appeal Bond.

18. Citation.

19. Stipulation as to making up Transcript of Record.

20. Order to transmit Record.

21. Clerk's Certificate.

It is further stipulated and agreed that the Clerk of this Court in making up the transcript of record on appeal in said case shall use copies of the portions of complainant's and defendants' printed records, which are included in four printed volumes, which were used at the hearing of said case in said Circuit Court, and which contain the proofs and certain exhibits, instead of transcribing the matter contained in said printed volumes from the original on file in said court, and he may certify the matter contained in said printed record in connection with such other matters and proceedings as may constitute the record in the case, in the same manner as if he had transcribed said printed matter from the original on file as aforesaid, the intention of the parties being that said printed records shall be treated and considered as true copies of the original of the matter they contain.

And it is further stipulated and agreed that the originals of Petitioner's Exhibits 41, 133, 186, and 256, and the several dredgers introduced in evidence by the parties herein, may be used on the argument and referred to in the briefs; but that the said exhibits 41, 133, 186 and 256 shall not be printed in the record.

Baltimore, Md., January 31st, 1912.

EDWIN P. GROSVENOR,
Special Assistant to the Attorney General.
JOHN PHILIP HILL,
United States Attorney.
LEWIS BRUCKER,
Solicitor for Barnes Mfg. Co. et al.
RUSSELL T. MACFALL &
FERDINAND WINTER,
Solicitors for Union Sanitary Mfg. Co. et al.
ROBERT B. HONEYMAN,
Solicitor for Colwell Lead Co. et al.
J. R. CAREY,
Solicitor for National Sanitary Mfg. Co. et al.
MARBURY, GOSNELL & WILLIAMS &
NOBLE, JACKSON & HUBBARD,
Solicitors for Appellants Other Than Those Named.

Order to Transmit Record.

And thereupon, it is ordered by the court here, that a transcript of the record and proceedings of the cause aforesaid, together with all things thereunto relating, be transmitted to the said Supreme Court of the United States, and the same is transmitted accordingly.

Test:

ARTHUR L. SPAMER, *Clerk.*

Clerk's Certificate.

UNITED STATES OF AMERICA,
District of Maryland, To wit:

I, Arthur L. Spamer, Clerk of the District Court of the United States for the District of Maryland, do certify that the matter contained in the aforegoing five volumes, to wit: Volume I, containing testimony of witnesses for the petitioner, paged 1 to 573 inclusive; Volume II, containing Government Exhibits, paged 1 to 360 inclusive; Volume III, containing testimony of witnesses for defendants, paged 1 to 528 inclusive; Volume IV, containing testimony of witnesses for the defendants and defendants' exhibits, paged 1 to 319 inclusive; Volume V, containing the pleadings, Opinion of the Court, Decree of Court and all proceedings subsequent thereto, constitute a true transcript of the record and proceedings in the therein entitled case of United States of America, Petitioner, vs. Standard Sanitary Manufacturing Company, A. Weiskittel & Co., The Barnes

Manufacturing Company, The Cahill Iron Works, Colwell Lead Company, The Day-Ward Company, The Humphreys Manufacturing Company, Kerner Manufacturing Company, The J. L. Mott Iron Works, McVay & Walker, The McCrum-Howell Company, The National Sanitary Manufacturing Company, Union Sanitary Manufacturing Company, United States Sanitary Manufacturing Company, L. Wolff Manufacturing Company, Wheeling Enameled Iron Company, Theodore Ahrens, Francis J. Torrance, E. L. Dawes, W. A. Myler, Anton Weiskittel, John D. Heise, C. H. Voegele, T. R. Barnes, F. H. Caldwell, J. J. Mahoney, Jesse T. Duryea, Bert O. Tilden, W. C. Winfield, A. G. Ward, S. N. Ford, Reid Carpenter, J. A. Frauenheim, Jordan L. Mott, Max Goebel, Thomas Walker, Alexander C. Walker, Lloyd G. McCrum, Howard G. Gates, Frank G. Borden, D. W. Davis, L. C. Huesman, E. V. Brigham, Charles Arrott, A. H. Kline, Jr., Ludwig Wolff, Herman Hoelscher, J. E. Wright, George W. Franzheim and Edwin L. Wayman, Defendants, No. 17 Equity Docket "G," heretofore pending in the Circuit Court of the United States for the District of Maryland prior to its being abolished by Act of Congress, approved March 3rd, 1911, made up in accordance with stipulation of counsel for the respective parties, filed in said case and copied in said transcript.

In testimony whereof, I hereunto set my hand and affix the sead of said District Court, this 15th day of February, 1912.

[Seal United States District Court, Maryland.]

ARTHUR L. SPAMER, *Clerk.*

Endorsed on cover: File No. 23,064. Maryland D. C. U. S. Term No. 988. Standard Sanitary Manufacturing Company et al., appellants, vs. The United States of America. Filed February 16th, 1912. File No. 23,064.

In the Supreme Court of the United States.

OCTOBER TERM, 1911.

STANDARD SANITARY MANUFACTURING Company et al., appellants, *v.* THE UNITED STATES OF AMERICA. } No. 988.

ON APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND.

MOTION TO ADVANCE.

Comes now the Solicitor General on behalf of the United States and moves the court to advance the above-entitled cause for hearing.

The appeal is from a final decree of the Circuit Court for the District of Maryland, entered in favor of the petitioner, November 25th, 1911.

This is a suit in equity instituted July 21st, 1910, under the Sherman Antitrust Act. The United States contends that an arrangement entered into by the defendants under so-called license agreements to use a patent constitutes a combination in violation of the

Sherman Act and an attempt to monopolize interstate commerce in sanitary enameled ironware.

Sanitary enameled ironware is unpatented. A patented tool called an Arrott dredger, which is an automatic sifter of powdered enamel, is useful but not essential in the manufacture of the ware. Sixteen defendant companies took license agreements to use this patented dredger, and incorporated in the license agreements conditions governing the prices and terms of sale of the unpatented enameled ware, such as bathtubs, lavatories, and sinks. These conditions controlled the trade of the manufacturers to more than four hundred jobbers, and also the trade of the jobbers with the plumbers, the latter being accomplished by means of so-called jobbers' license agreements. By means of these license agreements the defendants eliminated competition between themselves in making sales to jobbers, and also destroyed competition as to prices and terms of sale in sales by jobbers to plumbers. The manufacturers who joined the arrangement controlled approximately 85 per cent. of the production in the United States. The jobbers who signed the jobbers' agreements controlled more than 90 per cent. of the sales from jobbers to plumbers.

The defendants contend that they lawfully incorporated these restraints in the agreements by reason of the fact that the agreements were license agreements to use a patent.

Briefly stated, this case involves the following questions of law:

First. May the owner of a patent on a tool which is used in the manufacture of an article not patented, by licensing all the manufacturers of that unpatented article to use the patented tool in the process of manufacture, fix the prices and terms under which the unpatented article is sold by the manufacturers to jobbers and wholesalers, and also fix the resale prices and terms of sale by the wholesaler to the retailer?

Second. May all the manufacturers of an article not patented, which they sell throughout the United States in competition with each other, by agreement with each other enter into uniform license agreements with one individual to use in the manufacture of the nonpatented article a patented tool, the patent on which tool has been assigned by one of the manufacturers to that individual, and by means of such uniform license agreements establish uniform and noncompetitive prices and terms of sale of the unpatented article, thereby eliminating all competition between them in respect to the prices and terms of sale of the article which is not patented.

The defendants assert such rights exist by virtue of the patent laws, and have been rightfully exercised by them in this case. The Government contends that the patent laws grant no such privileges; that the patent laws and the Sherman Act are not conflicting, but in their respective domains are mutually exclusive of each other.

In the court below, the Attorney General filed a certificate as provided by the Expediting Act of Feb-

ruary 11, 1903, 32 Stat. 823, as amended June 25, 1910, 36 Stat. 854.

Opposing counsel consent that the case may be advanced.

F. W. LEHMANN,
Solicitor General.

MARCH, 1912.

FILED.
SEP 23 1912
JAMES H. McKENNEY,
Clerk.

Supreme Court of the United States.

OCTOBER TERM, 1912.

No. 554.

STANDARD SANITARY MANUFACTURING CO. ET AL.,
Appellants,

vs.

THE UNITED STATES OF AMERICA.

BRIEF ON BEHALF OF APPELLANTS.

HERBERT NOBLE,
HENRY D. ESTABROOK,
HARTWELL P. HEATH,
Of Counsel.

C. G. Burgoyne, 72 to 76 Spring Street, New York.

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MOTION

Supreme Court of the United States.

STANDARD SANITARY MANUFACTURING CO., ET AL.,
Appellants,

AGAINST

THE UNITED STATES OF AMERICA.

No. 554.
October Term, 1912.

BRIEF ON BEHALF OF APPELLANTS.

Statement of the Case.

This is an appeal (Transcript of Record, v. A., pp. 127, 128) from a decree filed November 27, 1911, in the office of the clerk of the then Circuit Court for the District of Maryland (v. A., pp. 125–127) dismissing the petition as to the defendants, Bert O. Tilden and George W. Franzheim and sustaining the allegations of the petition as to the other defendants except Ludwig Wolff, and enjoining said defendants from further proceeding with certain agreements, after a hearing at Richmond, Virginia, before GOFF and PRITCHARD, Circuit Judges, and ROSE, District Judge, upon a decision of said Court to which GOFF, Circuit Judge, dissented (v. A, pp. 103–125).

This is a proceeding in equity brought in the said Circuit Court under Section 4 of the Act of Congress, approved July 2, 1890, commonly called the Sherman Anti-Trust Act, by the filing of an original petition in the above-named Court on July 22, 1910, by the United States (v. A, pp. 2–42).

There were sixteen corporations and thirty-four individuals named as defendants (v. A., pp. 2, 3).

The petition alleged that the defendants had unlawfully and knowingly engaged and were at the time of the filing of the petition, engaged in a combination and conspiracy in

restraint of interstate and foreign commerce in sanitary enameled iron ware and that the defendants had attempted and were at the time of the filing of the petition attempting to monopolize said commerce by engaging in and continuing to engage in said combination (v. A., pp. 2–13).

The petition did not waive answers under oath and according to the rules of practice of said court and the law, the answers of the defendants were required to be made under oath. The duly verified answers of the defendants were duly filed. These answers denied the allegations of the petition and that the agreements referred to therein were unlawful and set up as an affirmative defense that the agreements complained of were valid under the Patent Laws (v. A, pp. 43–87).

Replications to said answers were duly filed (v. A, pp. 98–101).

Thereafter, by permission of the Court, the defendants Colwell Lead Co., Jesse T. Duryea and Bert O. Tilden filed a joint and several amended and supplemental answer (v. A, pp. 88–98) in which they set up the additional defense that they were not engaged in interstate commerce.

On or about October 31st, 1910, the government began the taking of its testimony and continued so doing until on or about December 22, 1910, when it closed its case.

On or about December 6th, 1910, indictments were found under the said act in the District Court of the United States for the Eastern District of Michigan against the same defendants, with the exception of John D. Heise and Edwin L. Wayman for the alleged violations thereof based upon the same matters, transactions and things, which were alleged in the petition as constituting the combination and conspiracy in restraint of interstate and foreign trade and commerce and the attempt to monopolize said trade and commerce.

On account of the pendency of the criminal proceedings and the necessity for preparing for the defense thereof and because of the unwillingness of the individual defendants to testify in the case lest any testimony that they might give, furnish information which might be used in an endeavor to incriminate them, the defendants secured an extension of time to take their testimony until April 22, 1911.

The defendants began the taking of their testimony on or about February 14, 1911, and continued so doing from time to

time until April 22, 1911, when the time allowed them to take testimony expired.

On account of the unwillingness of the individual defendants to testify in the case in view of the pendency of the criminal proceedings, the defendants were unable prior to the hearing of the case, to present a large portion of the testimony which was material to the proof of their defense and a motion for an enlargement of the defendants' time to take testimony was made at the hearing, pursuant to notice theretofore given (v. A, pp. 102, 103), and in the opinion of the majority of the court, it was said such motion could not be granted (v. A, p. 123) and the court proceeded to render its decree (v. A, p. pp. 125-127).

Specifications of Errors Relied Upon.

Numerous errors are assigned * and relied upon (v. A., pp. 129-134) but they naturally come, and in this brief will be considered, under the four following general heads:

1. That the Court below erred in not decreeing that the agreements entered into by the defendants, and

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* The Court erred:

FIRST. Because, as appears from the record in this cause, the Petitioner was not entitled to the injunction granted in said decree, and its application for the same should have been refused.

SECOND. Because, as appears from the record in this cause, neither of the defendants named, nor their agents, servants, or attorneys, in the manner set forth in the petition, or otherwise, entered into or engaged in a combination in restraint of trade and commerce among the several States in sanitary enameled iron-ware, or attempted to monopolize said trade and commerce in said ware in violation of the Act of Congress approved July 2, 1890, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies" or otherwise.

THIRD. Because, as appears from the record in this cause, the defendant Colwell Lead Company was not engaged in interstate commerce within the meaning of the Act of Congress approved July 2, 1890, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies."

FOURTH. Because, as appears from the record in this cause, the manufacturers' license agreements and the jobbers' license agreements, and the price lists made part of said agreements, all described in the petition in this cause, were not means adopted and used by the defendants in order to carry into effect the objects and purposes of any unlawful combination in restraint of said interstate trade and commerce in violation of said Act of Congress, and said agreements and price lists were legal and the Petitioner was

upon which the petition is based, were lawful under the Patent Laws of the United States and not subject to the provisions of the Sherman Anti-Trust Act.

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not entitled to an injunction enjoining the defendants and all and each of them, and their officers, agents, servants, and employees from doing anything in furtherance of said manufacturers' license agreements and jobbers' license agreements, and from enforcing said agreements or any of the terms thereof, and from adopting and enforcing said price lists in interstate commerce in sanitary enameled iron-ware.

FIFTH. Because, as appears from the record in this cause, the Petitioner was not entitled to the injunction granted in said decree enjoining and prohibiting the defendants, their officers, directors, agents, servants, and employees from continuing the combination described in this cause in interstate commerce in said ware, and more particularly in said manufacturers' license agreements and jobbers' license agreements, and said price lists, or by any other means similar thereto.

SIXTH. Because, as appears from the record in this cause, the Petitioner was not entitled to the injunction granted in said decree enjoining and prohibiting the defendants, their officers, directors, agents, servants, and employees from resuming, engaging in, continuing, or carrying into further effect the combination described in this cause, and from engaging in, or entering into any like combination, or by making any express or implied agreements or arrangements together, or one with another, like that described in this cause relative to the control or management of the business of said defendants in sanitary enameled iron-ware.

SEVENTH. In holding that the manufacturers' license agreements, the jobbers' license agreements, and the price lists made a part of said agreements, all described in the petition in this cause, were illegal and void.

EIGHTH. In holding that the manufacturers' license agreements, the jobbers' license agreements, and the price lists made a part of said agreements, all described in the petition in this cause, were not legal under the patent laws of the United States.

NINTH. In not holding that the manufacturers' license agreements, the jobbers' license agreements, and the price lists made a part of said agreements, all described in the petition in this cause, were legal under the patent laws of the United States.

TENTH. In holding that the defendant Wayman, as owner of the patents described in this cause, could not legally under the patent laws of the United States make with the corporate defendants the manufacturers' license agreements, the jobbers' license agreements, and establish the price lists made a part of said agreements, with regard to sanitary enameled iron-ware made by the use of the inventions covered by said patents.

ELEVENTH. In not holding that the defendant Wayman induced the several defendants to enter into the manufacturers' license agreements and the jobbers' license agreements, and to adopt the price lists made a part of said agreements, all described in the petition in this cause, for the purpose of exploiting the inventions covered by the patents mentioned in the petition in this cause, and in order to increase the royalties to be derived by him from the use of said invention.

2. That the Court below erred in not decreeing that the agreements entered into by the defendants, and upon which the petition is based, were not in restraint

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TWELFTH. In holding that the owner of patents could not legally under the patent laws fix the price and prescribe the terms and conditions under which the product of the use of the inventions covered by said Letters Patent could be sold.

THIRTEENTH. In holding that the owner of patents could not legally under the patent laws fix the price and *describe* (*sic.*) the terms and conditions under which the product of the use of the inventions covered by said Letters Patent could be resold.

FOURTEENTH. In holding that the agreements described in the petition in this cause were illegal and in violation of the Act of Congress approved July 2, 1890, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies."

FIFTEENTH. In holding that the defendants entered into a combination in restraint of trade and commerce among the several States in sanitary enameled ironware in violation of the Act of Congress approved July 2, 1890, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies."

SIXTEENTH. In holding that the defendants attempted to monopolize trade and commerce among the several States in sanitary enameled ironware in violation of the Act of Congress approved July 2, 1890, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies."

SEVENTEENTH. In holding that the manufacturers' license agreements, the jobbers' license agreements, and the price lists made a part of said agreements, all described in the petition in this cause, were means adopted and used by the defendants in order to carry into effect the objects and purposes of an unlawful combination in restraint of trade and commerce among the several States in sanitary enameled iron-ware in violation of the Act of Congress approved July, 2, 1890, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies."

EIGHTEENTH. In holding that the manufacturers' license agreements, the jobbers' license agreements, and the price lists made a part of said agreements, all described in the petition in this cause, were means adopted and used by the defendants in order to carry into effect the objects and purposes of an attempt to monopolize trade and commerce among the several States in sanitary enameled iron-ware in violation of the Act of Congress approved July 2, 1890, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies."

NINETEENTH. In not holding that the manufacturers' license agreements, the jobbers' license agreements, and the price lists made a part of said agreements, all described in the petition in this cause, were not subject to the provisions of the Act of Congress, approved July 2, 1890, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies."

TWENTIETH. Because the record showed that the defendants acted in good faith in entering into the manufacturers' license agreements, the jobbers'

of interstate trade and commerce and not in violation of the Sherman Anti-Trust Act, and that the use of the patents was not a subterfuge.

3. That the Court below erred in not granting the

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license agreements, and in adopting the price lists made a part of said agreements, all described in the petition in this cause, believing them to be legal under the patent laws of the United States.

TWENTY-FIRST. Because the record showed that the manufacturers' license agreements, the jobbers' license agreements and the price lists made a part of said agreements, all described in the petition in this cause, were entered into by the defendants for the purpose of improving the conditions of the business in sanitary enameled iron-ware, and the result was, without increasing the price, to improve the quality of the ware, to prevent unfair competition and to establish the business upon a better and surer basis, and was not in any respect to coerce or compel those not parties to the agreements to cease dealing in sanitary enameled iron-ware or to prevent competition among dealers in the same.

TWENTY-SECOND. In holding that the agreements mentioned in the petition in this cause, and particularly those embodied in the manufacturers' license agreements, the jobbers' license agreements and the price lists made a part of said agreements, all described in the petition in this cause, were price agreements pure and simple, and as such illegal.

TWENTY-THIRD. In holding that price agreements pure and simple are always illegal, without regard to whether the prices fixed are reasonable or unreasonable, or whether they tend to restrain interstate trade or commerce, or to stifle competition, or whether they tend to render business more stable and enable manufacturers, jobbers and retailers to conduct business at a reasonable profit upon the reasonable expense of production, handling and sale.

TWENTY-FOURTH. In holding that the manufacturers' license agreements, the jobbers' license agreements, and the price lists, made a part of said agreements, all described in the petition in this cause, could not legally be made by the defendant Wayman in so far as such contracts attempted to control and fix the prices and resale prices at which unpatented enameled ware made by the use of the inventions covered by the patents referred to in said petition should be sold, though enameled ware made by the use of such inventions was smoother, evener, thinner, and more durable, the ware of better quality, and the workmen could do more work in the same time under better conditions, of better quality, and at less cost to the manufacturer.

TWENTY-FIFTH. In holding that the owner of patents could not legally make contracts controlling and fixing the prices and resale prices of the product of the use of the inventions covered by the patents, though the articles made by the use of such inventions were of better quality, could be produced at less cost and under better conditions, and the prices fixed were reasonable.

TWENTY-FIFTH (*a*). Because it appears from the record in this cause that the agreements referred to in the petition were entered into by the defend-

motion of the defendants for an enlargement of time to take testimony and that the hearing of the case be postponed until the taking of the defendants' testimony could be completed.

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ants primarily for the purpose and with the effect of preventing the manufacture of inferior and defective articles of sanitary enameled iron-ware which on account of their similarity of appearance were often sold as sound articles, thereby eliminating unfair competition in such ware, improving the reputation of the ware, preventing the substitution for the ware of other articles of similar character and for similar purposes, promoting the trade in said ware and enhancing the value of the patent; and any resulting restraint of trade, if any, and any restriction of competition, if any, was merely incidental to said primary purpose and effect and was more than compensated for in the benefit to the public by the stimulation of competition among manufacturers of said ware in the quality of the product, each manufacturer being by virtue thereof relieved of the temptation to manufacture and sell inferior goods because compelled in order to retain his rights under the patents and his share of the trade to turn out the best possible product at the price fixed, said price so fixed being reasonable.

TWENTY-FIFTH (*b*). Because it appears from the record in this cause that the agreements referred to in the petition were entered into by the defendants primarily for the purpose and with the effect of preventing the manufacture and sale of inferior goods, of compelling the manufacture and sale of first class goods, of enhancing the reputation of sanitary enameled iron-ware and the value of the patents, of preventing the substitution of articles of similar character and used for similar purposes for such ware, of promoting the trade in said ware and for the benefit of the parties to said agreements and the public; and the restraint of trade, if any, and the restriction of competition, if any, were more than compensated for by the benefits derived from the stimulation of competition among the manufacturers of said ware in improving the quality of their product and the incentive given each manufacturer to turn out the best possible product at the price fixed, which price was reasonable.

TWENTY-FIFTH (*c*). Because it appears from the record in this cause that the agreements referred to in the petition were entered into by the defendants primarily for the purpose and with the effect of preventing unfair competition in sanitary enameled iron-ware, of improving the quality of said ware, of enhancing its reputation and the value of the patents and of promoting the trade in such ware by preventing the substitution of other articles therefor; and the restraint of trade, if any, and the restriction of competition, if any, was merely incidental to said primary purpose and effect.

TWENTY-SIXTH. In not holding that the agreements described in the petition in this cause, and particularly the manufacturers' license agreements, the jobbers' license agreements, and the price lists made a part of said agreements, all described in the petition in this cause, were reasonable and enabled the manufacturers to improve the quality of sanitary enameled

4. That the Court below erred in decreeing that the Government had established a case entitling it to an injunction against the defendants.

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iron-ware, and the prices fixed were reasonable and yielded only a reasonable profit over the reasonable expense of production, handling and sale.

TWENTY-SEVENTH. In holding that the motion of the defendants that further proceedings in this cause be postponed until the criminal proceedings pending in the District Court for the Eastern District of Michigan against these same defendants have been finally disposed of and that the taking of testimony be reopened could not be granted.

TWENTY-EIGHTH. In overruling the defendants' application for leave to take further testimony.

TWENTY-NINTH. In not holding that the petitioner was not entitled to a decree in this cause while pressing the criminal prosecution against the defendants on account of the same transactions on account of which the decree in this cause was asked.

THIRTIETH. In holding that this cause was ripe for decree in view of the fact that the petitioner was pressing the criminal prosecution against the defendants for the same transactions on account of which the decree in this cause was asked, and at the same time preventing the defendants from testifying in their own defense in this cause as to material matters by threatening if they did so to use said testimony against them at the trial of said criminal prosecution.

THIRTY-FIRST. In not holding that the individual defendants were made parties to this cause merely for the purpose of discovery and should not be included in any injunction order or decree.

THIRTY-SECOND. In not dismissing the said petition as to the individual defendants on the ground that they were merely joined for purposes of discovery.

THIRTY-THIRD. In not dismissing the said petition so far as the order for injunction was involved as to said individual defendants on the ground that they were merely joined for purposes of discovery.

THIRTY-FOURTH. In not dismissing the said petition on the ground that the facts established by the testimony do not sustain the allegations of the petition.

THIRTY-FIFTH. In awarding costs to the petitioner and against the defendants.

Wherefore, in order that the foregoing Assignments of Error may be and appear of record, defendants present the same to the Court and pray that such disposition be made thereof as is in accordance with law and the statutes of the United States in such cases made and provided, and said defendants, and each of them, pray for a reversal of said decretal order, and that an order be entered dismissing said petition as to each and every of them.

BRIEF OF THE ARGUMENT.

The gravamen of the Government's involved charge is, that while a Mr. Wayman, whose career is hereinafter considered, may have concocted and organized a scheme for his own aggrandizement, his co-defendants were easy converts and worked with him for its consummation, so that it amounted to a wicked conspiracy to circumvent the Sherman Act by basing the scheme on a patented invention of little or no importance and used only as a subterfuge to justify, under patent law, acts that otherwise would be illegal, and that the defendants should not be suffered to thus do by indirection what they are prohibited from doing directly. Let us disentangle this yarn of accusation and see what it all amounts to.

In the first place, whether it is wicked to attempt to circumvent the Sherman Act depends somewhat upon the meaning of the Sherman Act as well as the meaning of the word "circumvent." Translated literally, according to its rhyme and not its reason, the Sherman Act is a blight upon enterprise. The venom of anarchy could not elaborate a more enervating, paralyzing proscription. All business would be under the ban of the law; with the result that it would be left to the caprice or favor of the Attorney-General to give immunity to favorites or punish enemies. If the Sherman Act means this, then we make bold to say that it is the righteous duty of every lawyer to circumvent the Sherman Act if it can be accomplished.

But what is the meaning of this word "circumvent"? If a man side-steps a blow aimed at him by any one, is he not obeying a natural impulse? If a man's remedy for a wrong is barred at law, does he circumvent the law if he resorts to equity? If certain acts dictated by self-interest are illegal unless done under the sanction of patent law, is it reprehensible to legalize such acts by doing them under patent law?

We will shortly demonstrate that the scheme complained of from beginning to end was that of Mr. Wayman, whose only motive was to make money for himself, not as a manufacturer but as the owner of a patent, receiving royalties from those whom he licensed to use his patented invention. The motives

of the other defendants as manufacturers may have been as various as their various interests; but if what was done was legal, the question of motive on the part of anybody is clearly immaterial.

(Diamond Match Co. vs. Roeber, 106 N. Y., 473; McCune vs. Norwich City Gas Co., 30 Conn., 521; Glendon Iron Works vs. Uhler, 15 Amer. R., 599; Harvard Law Review, Vol. XX., Nos. 4, 5 and 6).

So, too, the question whether Mr. Wayman bought the patent with his own money or borrowed the money to pay for it, or whether it was given to him outright, becomes equally immaterial; for there is no question but that the Standard Company was the owner of the Arrott patent and could dispose of it as it pleased. Nor is there any question as to the paramount value and importance of the Arrott invention in the manufacture of enameled iron ware. Nor is there any question but that the Standard Company had over 50% of the licensed furnaces using this invention (Petitioner's Exhibit No. 132, pp. 188, 189), and turned out fifty per cent. of the enameled iron ware manufactured in the United States, all of first class quality.

(*Infra*, pp. 32-51, *John D. Park & Sons Co. vs. Hartman*, 153 F., 24; *United States vs. Joint Traffic Association, infra*).

The evidence shows that the standard's goods came in competition with goods of cheaper grade and defective workmanship, called "seconds," which were nevertheless sold to the ultimate purchaser as perfect ware. The evidence shows that the Standard Company had tried to prevail upon its competitors to use the Arrott invention on a royalty basis, which offer had been rejected principally because it would give the Standard Company a right of access to the books of its rivals and competitors.

Presuming now that the Standard Company had invited all of its competitors throughout the country to a conference in Chicago, Mt. Clemens or New York, and had said to them in substance: "Gentlemen, as you know, this Company turns out fifty per cent. of the enameled iron ware used in the United States. Our product is first-class in every particular. We make no "seconds," or if by accident or neglect we do turn out

an occasional defective article, we promptly destroy it. We are enabled to do this perfect work by means of the so-called Arrott invention. Most of you know the merits of this invention and how necessary it is in the making of first-class enameled iron ware. You also know that not one of your factories turns out uniformly first-class work. The perfect article is the exception and not the rule with all of you. But it is a fact that our Company is obliged to compete in the open market with your wares, for the reason that the difference in quality is discernible only by experts. When use demonstrates the worthlessness of your output all enameled iron ware is discredited. To speak plainly, you defraud the public, you discredit the ware and demoralize the market and the business. Now we are willing to license every one of you to use the Arrott invention for making your wares if you will become licensees on our terms. We want you first and foremost to agree that no "seconds" shall be marketed. We want you in the second place to agree on a standard price, so that henceforth our rivalry shall be in the quality of the ware turned out at a uniform price, or in any other collateral inducement to the purchaser that does not affect the quality of the ware. We do not wish access to your books, nor have we any curiosity as to the details of your business; and in order that none of you shall be in a subordinate relationship to us we will put the legal title of the Arrott patent in Mr. Wayman. To compensate him for his services in acting as commissioner, umpire, referee, or whatever you please to call it, to compensate him for watching us and insuring our *bona fide* observance of the terms and conditions agreed upon, we will each of us pay him a royalty for the use of the Arrott invention. We believe that it is to your interest to accept this proposition, and, all things considered, we have concluded it is to our interest to make this proposition."

If Your Honors please, this is all there is in substance or principle to the case at bar, except that Mr. Wayman, instead of the Standard Company, was the originator of the scheme and that he persuaded his co-defendants to enter into it. But if the Standard Company by the method suggested could properly and legally have licensed its co-defendants on the terms complained of by the Government, then certainly the acts of

the defendants were not illegal merely because the suggestion originated with Mr. Wayman.

We likewise strenuously contend that irrespective of patent law or patent rights the acts of the defendants did not in any reasonable sense create a monopoly, nor restrain commerce, nor limit output, nor throttle competition ; and so were not obnoxious to any fair reading of the Sherman Act. We are quite positive of this if the real interest of the public is the criterion of the interpretation of that law. We respectfully protest that the rule of possible evil—that the mere power to do evil is equivalent to the actual doing of it would make potential bomb throwers of us all. In the very nature of things the law may not punish any one for the wrong he might do if he were so disposed. It is a very Nero of jealous tyranny that would so take counsel of its fears.

I.

THE COURT BELOW ERRED IN NOT DECREEING THAT THE AGREEMENTS ENTERED INTO BY THE DEFENDANTS AND UPON WHICH THE PETITION IS BASED WERE LAWFUL UNDER THE PATENT LAWS OF THE UNITED STATES AND NOT SUBJECT TO THE PROVISIONS OF THE SHERMAN ANTI-TRUST ACT.

Statement of Facts :

The defendant Edwin L. Wayman was subpœnæd and called as the first and principal witness on the part of the Government, and was examined at length (v. I., pp. 1-218). He was recalled by the defendants and testified (v. IV., pp. 98–244, 268–278).

Mr. Wayman testified fully, frankly and freely—his direct examination occupying four days, and his examination on behalf of the defendants occupying four days.

Mr. Wayman's career has so much influence upon the true understanding of this case that it should be stated by way of preamble.

When a lad Mr. Wayman entered the employ of the Western Electric Company as a bill clerk, in 1895. He was promoted at various times, until, in the latter part of 1901, he was sent by the Western Electric Company to Detroit to open a sales office there (v. IV., p. 109).

In that City he occupied offices with Mr. Eugene H. Sloman, a broker and real estate operator, and there sprang up between them a great intimacy (v. IV., p. 109).

Mr. Sloman was, at this time, engaged in experimenting in an effort to draw shells of bath-tubs out of a single sheet of steel (v. IV., p. 110), such shells to be afterwards enameled and to be sold in competition with sanitary enameled iron bath-tubs made of cast iron and enameled.

Mr. Wayman rendered Mr. Sloman valuable aid and assistance in such experiments, among other things, by selling him an electric motor, upon long credit, with which to operate the machine for drawing the sheet steel into forms for bath-tubs (v. IV., pp. 110, 120, 128).

Mr. Wayman was in charge of the sales office of the Western Electric Company at Detroit until 1903, when he went to San Francisco as sales manager of the Supply Department of the same Company (v. IV., p. 110).

Here, as a result of his work, he was promoted to be assistant manager and later manager (v. IV., p. 110). As a result of Mr. Wayman's work at San Francisco, the sales of the Company were more than doubled in a short time (v. IV., p. 111).

He held these positions at the time of the great earthquake and fire in April, 1906 (v. IV., p. 111).

At that time Mr. Wayman, with certain of the employes of the Western Electric Company, was able to reach the building of the Company early on the morning following the earthquake and at the beginning of the conflagration which destroyed San Francisco (v. IV., p. 111). He at once policed the building with employes, got out the fire fighting apparatus, and saved the building and its contents—the latter valued probably at $1,000,000 (v. IV., p. 111), while all the surrounding buildings were destroyed including all the other electrical supply houses (v. IV., p. 111).

When Mr. Wayman went to San Francisco the business of the Western Electric Company in the Supply Department amounted to about $250,000 a year. During Mr. Wayman's administration it increased to a million dollars a year, and the Telephone Department to seven million dollars a year (v. IV., pp. 111, 112). Mr. Wayman was in the employ of the Western Electric Company and its branch companies for eleven years (v. IV., p. 126).

During Mr. Wayman's connection with the Western Electric Company a large portion of its business, including lamps, sockets, switches, cut-outs, etc., was done under patent License Agreements, similar to those in the case at bar and no one questioned their legality (v. IV., pp. 110, 112, 113, 126). Mr. Wayman, as salesman for the Western Electric Company, and as manager, thus became thoroughly familiar with such license contracts and with the operation of business under them.

Meanwhile, Mr. Sloman's work had grown, a factory had been erected, and in October, 1906, Mr. Wayman, at the request of Mr. Sloman, severed his connection with the Western Electric Company and went to Detroit as sales manager of the Seamless Steel Bath Tub Company, which Mr. Sloman had organized to manufacture and sell Seamless Steel bath tubs, manufactured under certain Letters Patent of the United States which he had secured (v. IV p. 113).

The organization of the Company, and the business conducted by it, was the result of the experiments in which Mr. Sloman was engaged, as above stated, in 1901 (v. IV p. 113) when Mr. Wayman first met him.

Mr. Wayman having become thoroughly familiar with the manner and advantages of conducting business under Patent License Agreements, while with the Western Electric Company, endeavored to secure similar license agreements under the patents owned by the Seamless Steel Bath Tub Company, with its customers, and did secure such agreements with some of its customers; among others, the Republic Manufacturing Company (v. IV., pp. 114-120) and with some manufacturers, all looking to exploiting the company's patents on Seamless Steel tubs. He was not able, however, to secure such license agreements with a sufficient number of the customers of the Seamless Steel Bath Tub Company or the other manufacturers of bath tubs (v. IV., pp. 114, 117) to get the full advantage of the patents, and, therefore, he was obliged to abandon his plan (v. IV., pp. 114-120).

At this time the Seamless Steel Bath Tub Company was a member of an association of manufacturers of Sanitary Enameled Ware, organized for the purpose of promoting better trade conditions and increasing and improving the busi-

ness in Sanitary Enameled Ware ; and Mr. Wayman represented the Seamless Steel Bath Tub Company in this association (v. IV., p. 128). He thus came to know other manufacturers of enameled ware, and also became familiar with the conditions of the Sanitary Enameled Ware business generally, the difficulties to be met, and the possibilities of the trade therein.

He personally, as salesman, sold more than 20,000 bath tubs manufactured by the Seamless Steel Bath Tub Company thereby becoming familiar with the commercial side of the business ; and he was also familiar with the manufacturing side (v. IV., p. 127).

In the early part of 1907 the Seamless Steel Bath Tub Company was notified by the Standard Sanitary Manufacturing Company that that Company was the owner of the Arrott patent, No. 633,941 (the basic patent involved in the case at bar) ; that the said patent had been sustained by the Courts in a suit against the J. L. Mott Iron Works, and that the Seamless Steel Bath Tub Company was infringing the invention covered by that patent, and that the Seamless Steel Bath Tub Company was required to cease such infringement (v. IV., p. 101). This was a very serious matter for his Company, as will appear.

The steel shells were one hundred or more pounds lighter than the ordinary cast iron tub, and consequently, on account of the difference in the quantity of the material in the tub and on account of the difference of kind of material, the steel shells did not retain the heat so long as the cast iron tubs (v. IV., pp. 112, 113) ; so that an enameling method whereby the enamel could be put on quickly was indispensable.

The only known method of doing this was by using the Arrott dredger (v. III., p. 117). As a result of experiments and experience Mr. Wayman came to the conclusion that it would be impossible, without the use of the dredger covered by the Arrott patent, to distribute the enameling powder over the tub with sufficient rapidity to get the powder on while the tub retained its heat (v. IV., pp. 101, 102).

Mr. Wayman consulted his patent attorney, Mr. James W. Whittemore, as to whether the device being used in the factory of the Seamless Steel Bath Tub Company was an infringement of the Arrott invention, and was informed by him that it was,

and also that he (Mr. Whittemore) knew of no equivalent device to be substituted for the Arrott invention (v. IV., p. 108). Being in this position, Mr. Wayman took up with the Standard Sanitary Manufacturing Company the question of securing a license under the Arrott patent for the Seamless Steel Bath Tub Company. At first the Standard Sanitary Manufacturing Company declined to give a license, stating that it did not care to grant licenses under the patent (v. IV., p. 102). After continued negotiations, however, the Standard Sanitary Manufacturing Company advised the Seamless Steel Bath Tub Company that it would grant a license under the patent to the Seamless Steel Bath Tub Company. Thereupon, Mr. Wayman asked to have the license papers prepared and sent him (v. IV., p. 109). This was not promptly done, however, and shortly thereafter the Seamless Steel Bath Tub Company, for want of sufficient capital, the death of its financial backer, and on account of the panic of the Fall of 1907, got into financial difficulties, and Mr. Wayman did not follow up procuring the license (v. IV., p. 109, 116).

From the early part of 1908, until the Summer of 1909, Mr. Wayman was constantly engaged in trying to secure financial assistance for the Seamless Steel Bath Tub Company and to reorganize the Company (v. IV., p. 109, 126). He did not succeed, however. He was a stockholder and largely interested in it (v. I., p. 49).

Mr. Wayman had also endeavored to secure control of the Arrott patent in another way, as follows:

Early in the Spring of 1908, knowing the importance of the Arrott patent in the manufacture of enameled ware, Mr. Wayman endeavored to have the Standard Sanitary Manufacturing Company license the other manufacturers of Sanitary Enameled Iron Ware for the purpose of improving the trade conditions (v. IV., p. 102). He interested Mr. George E. Day, of the Day-Ward Company, and Mr. Thomas R. Barnes, of the Barnes Manufacturing Company (v. IV., pp. 102, 103). But the Standard Sanitary Manufacturing Company stated that it was unwilling to grant licenses; and the other manufacturers were unwilling to take licenses from the Standard Sanitary Manufacturing Company because, as licensees for the purpose of collecting royalties) their books would have to be open to the Standard Sanitary Manufacturing Company, a competitor.

Under these conditions, Mr. Wayman conceived the idea of organizing a holding company, with capital contributed by himself, Mr. Day, Mr. Barnes and some others, to buy the Arrott patent from the Standard Sanitary Manufacturing Company, and license, on terms, the Standard Sanitary Manufacturing Company and other manufacturers (v. IV., p. 103).

With this end in view, and on or about March 7th, 1908 (v. IV., p. 103, Defendants' Exhibits 14, 15, 16, 17), Mr. Wayman, Mr. Day and Mr. Barnes visited Trenton, where they conferred with Mr. Matlack, manager of the Potteries Selling Company, with regard to the organization and operation of that Company, thinking that a similar company might serve their purposes. Thereafter, pursuant to Mr. Wayman's plan, Mr. Day and Mr. Barnes conferred with Mr. Torrance, of the Standard Sanitary Manufacturing Company, who stated that his Company was unwilling either to sell the Arrott patent or to enter into any arrangement which would lessen the advantage which it had by reason of its ownership of the Arrott patent (v. IV., p. 108).

Thereupon that plan was abandoned (v. IV., p. 108).

Early in August, 1909, Mr. Wayman was informed by Mr. A. H. Cline, Jr., of the United States Sanitary Manufacturing Company, that the Association of Sanitary Enameled Ware Manufacturers was about to be reorganized and a new Commissioner appointed. Mr. Cline suggested that Mr. Wayman apply for the position (v. IV., p. 126). Not having succeeded in getting capital to reorganize the Seamless Steel Bath Tub Company, he took the suggestion under advisement. He talked with his wife and with Mr. Colquitt, one of his business associates. All three agreed that it would afford Mr. Wayman an excellent opportunity to continue his efforts to buy the Arrott patent and of establishing such relations with the various manufacturers of Sanitary Enameled Ware as would enable him to present his ideas with regard to the advantages of patent licenses under the Arrott patent in the most favorable manner (v. IV., p. 127).

The articles of association of the Association and the objects show that it was a pure trade organization, and it was expressly provided that "the Association is not formed to control or regulate prices of goods manufactured by its members v. IV., pp. 129-132).

Accordingly, Mr. Wayman applied for the position suggested by Mr. Cline in connection with the Sanitary Enameled Ware Association, and was elected (v. IV., p. 127). There were three candidates and the vote was divided—Mr. Wayman being elected by a majority of one or two (v. IV., p. 16).

Mr. Wayman assumed the duties of the position within a few days after his election (v. IV., p. 127).

With his real purpose in mind, he applied for the necessary financial aid to secure the Arrott patent to Mr. Sloman, with whom his relations of a very intimate character had continued and who had offered to aid him in any way he could (v. I., p. 139; v. IV., p. 128). Mr. Sloman agreed that if Mr. Wayman could secure the patent he would aid him financially in the matter whenever it was necessary (v. I., p. 139; v. IV., p. 128), and the event proved that he did (v. IV., p. 128, Defendant's Exhibits, Nos. 23–27).

In the latter part of August, 1909, Mr. Wayman spoke to Mr. Theodore Ahrens, one of the defendants and President of the Standard Sanitary Manufacturing Company (v. IV., pp. 134, 139) with regard to purchasing the Arrott patent. Mr. Ahrens referred him to Mr. E. L. Dawes, also one of the defendants and Vice-President and General Manager of Factories of the Standard Sanitary Manufacturing Company (v. IV., p. 134).

He conferred frequently with Mr. Dawes after that (v. I., p. 139; v. IV., pp. 134, 135). At first Mr. Dawes was not interested by the proposition, but Mr. Wayman kept at it, dwelling upon the great improvement in enameled ware that would come through the use generally of the Arrott dredger; explaining to him that he proposed to include in the licenses which he would grant a provision prohibiting the manufacture and sale of "seconds," and that thus through greatly improved enameled ware, which could only be made by using the Arrott invention and by the elimination of "seconds," the Standard Sanitary Manufacturing Company, which did not manufacture or sell "seconds," would have to compete only with goods of a similar high class to its own product and would greatly increase its business with the general increase which would follow the improvement, since the Standard manufactured and sold about 50 per cent. of the ware sold in the United States (v. II., pp. 188–9, Petitioner's Exhibit 132); Mr. Dawes became interested (v. IV., p. 134, 135).

"Seconds" are articles of enameled ware which are in any respect defective, and which will not pass inspection for the grade for which they are intended, but which were then being sold, and are now sold by some manufacturers as of the grade for which they were intended (v. IV., pp. 40, 57, 142); for instance, the Iron City Sanitary Manufacturing Company sells its product to jobbers by the run of the kiln, without itself grading it at all (v. IV., p. 264). The result was, and is, that the jobber who purchases the product of the Iron City Sanitary Manufacturing Company may sell in competition with the Standard Sanitary Manufacturing Company's high-class product an article of a very inferior quality. Such jobber can necessarily charge a very much lower price than the Standard Sanitary Manufacturing Company can afford to charge, but which the Standard Sanitary Manufacturing Company must meet in competition.

One of the great evils of "seconds" appears from the testimony (v. IV., pp. 45, 52, 66) to be that plumbers bid upon specifications requiring a certain high class of articles of enameled ware, that they then go to a jobber and purchase an inferior article (a second) which they furnish to the builder, or owner, with a label of their own, as the article specified. The result is that the house-owner gets an inferior article, is deceived, and, upon learning, by use, the defective character of the article, blames the jobber who had no knowledge what the plumber was required to furnish, and no power to compel him to buy the article specified (v. IV., pp. 45, 52, 66). Thus Sanitary Enameled Ware was getting a very bad reputation, and it was becoming increasingly more difficult to maintain or extend the sale (v. A., pp. 50, 62, 75, 97; v. II., p. 97; v. IV., pp. 39, 42, 58). The sale of porcelain and vitreous china ware was increasing in competition with sanitary enameled ware (v. I., p. 67; v. IV., pp. 134–138, 142, 143, 185).

With the elimination of "seconds" the plumber was able to get only an honest article and thereby the jobbers, the builder, and the owner were protected and benefited (v. IV., pp. 46, 55, 58).

Mr. Wayman's argument as to the making of high-class ware exclusively, such as could be manufactured only by the use of the Arrott dredger and with regard to the advantages of the elimination of "seconds," impressed Mr. Dawes. He

saw thereby a great improvement in the trade in Enameled Ware, to which he had devoted his life (v. IV., p. 135), and, after some further negotiations, he agreed, on or about December 28, 1909, to give Mr. Wayman an option upon the Arrott patent for six months, either to take an exclusive license with a right to license others upon such conditions as he might prescribe, the Standard Sanitary Manufacturing Company retaining a non-exclusive license, or, if the Standard Sanitary Manufacturing Company decided to take a license, to purchase the patent outright (v. IV., pp. 99, 100, 136).

Mr. Dawes says that the price at which Mr. Wayman was to secure control of the Arrott patent was fixed at this time, after he (Dawes), without Mr. Wayman's knowledge, had consulted with the Executive Committee of the Standard Sanitary Manufacturing Company (v. III., p. 479).

Mr. Wayman testified that the price was determined by fixing upon a method of calculating it, but that the exact number of dollars was not definitely named until about the middle of March, 1910 (v. IV., p. 276).

The price paid was $10,000 for an assignment of the patent, subject to an option on the part of the Standard Sanitary Manufacturing Company to have the patent reassigned at the end of two years (v. I., pp. 129, 131, 133, 134–137, 172–178).

The price was arrived at by adding together the purchase price paid by the Standard Sanitary Manufacturing Company to Arrott, the cost of litigation in sustaining the patent, and a further sum equal to 50 per cent. of this amount—making a total of $85,000, and dividing this by 17—making the cost $5,000 per year to the Standard Sanitary Manufacturing Company. Mr. Wayman bought it, but after two years the Standard Sanitary Manufacturing Company could get it back (v. IV., p. 276).

That this was an adequate consideration appears from the fact that the inventor and patentee, J. W. Arrott, Jr., in 1905, sold the patent to the Standard Sanitary Manufacturing Company for $35,000 (v. III., p. 419). In 1905 the patent had eleven years to run, which would make the consideration paid Arrott, prorated through the life of the patent, something less than $3,200 a year; while Mr. Wayman paid at the rate of $5,000 a year.

Prior to securing the option upon the Arrott patent, and about December 15, 1909, Mr. Wayman had secured an option from the J. L. Mott Iron Works upon the Ditheridge patent (v. I., pp. 33, 34, 187; v. IV., p. 99), and on or about January 10, 1910, he secured from the L. Wolff Manufacturing Company an option upon the Lindsay patent (v. I., p. 34, v. IV., p. 99).

These two last named patents were procured by Mr. Wayman because they were believed by him to be infringing patents (v. IV., p. 138). They were infringing patents (v. IV., p. 360).

Immediately after securing the option (December 28, 1909), upon the Arrott patent, which had been established as the basic patent (v. IV., p. 138), Mr. Wayman sent out to practically all the manufacturers of Sanitary Enameled Iron Ware a circular letter (December 30 and 31, 1909), informing them that he had procured from the Standard Sanitary Manufacturing Company the right to license the other manufacturers of enameled ware under the Arrott patent (v. I., p. 155).

Mr. Wayman followed this up by talks with the various manufacturers at their several places of business (which he visited for the purpose) and elsewhere, whenever he had the opportunity, urging upon them in season and out of season the importance of improving the ware, the selling only of honest articles, and that he could bring this about by granting them licenses under the patent, containing restrictions, explaining to them the plan he had in mind and the advantages which he conceived would accrue therefrom (v. IV., pp. 137, 138, 140, 141).

He worked also upon the details of a license, getting his ideas chiefly from the former licenses he had drawn while with the Seamless Steel Bath Tub Company and his experience as a saleman of bath tubs, as well as from the patent licenses he had worked under while with the Western Electric Company. In the original exhibit portions are stricken out and certain other portions interlined or added—this being done at the time the rough forms for the present license agreements were being made. In the printed exhibit, the insertions are in italics and the matter stricken out in black type (v. IV., pp. 121, 144, 304–307).

Then there was a meeting of the Sanitary Enameled Ware

Association in Pittsburgh on February 1, 1910. After the adjournment of the meeting Mr. Wayman took advantage of the presence of a large number of the manufacturers to further talk to them, informally, about his plan. Some objected, some did not know what to say and the majority said they would enter into such a license (v. I., p. 31; v. IV., pp. 141, 142). Thereafter he wrote to the various manufacturers a letter similar to Petitioner's Exhibit No. 12, dated February 7, 1910 (which was the copy sent to Mr. Kohler, of the J. M. Kohler Son's Company), continued to visit them at their various factories, and whenever he could meet any of them he urged the use of the invention covered by his patents (v. I., p. 29, Petitioner's Exhibit No. 7).

Not having secured any definite or tangible results from his work in January and February (1910), Mr. Wayman asked the representatives of several of the leading manufacturers of Sanitary Enameled Iron-Ware to meet him in Chicago, on March 2, 1910 (v. I., p. 12; v. IV., pp. 140, 144; Petitioner's Exhibit No. 51, v. I., p. 94), at which meeting he again outlined the plan of his proposed patent licenses, and invited expressions of opinion from those present whether their companies would take licenses from him under the Arrott and other patents (v. IV., pp. 140, 144).

He accomplished very little by this effort, and he determined to prepare a memorandum embodying some of the features of his scheme and try to get that signed. Accordingly that night, at his mother's-in-law, Mr. Wayman, without assistance and without consultation with, or the advice of, anyone—lawyer or layman—drew up a memorandum of agreement covering the granting of licenses by him under the patents he might control with regard to the manufacture of Sanitary Enameled Iron Ware; a copy of the agreement was attached to the petition as Exhibit 3, and is petitioner's Exhibit No. 3 in the testimony (v. IV., p. 145).

Mr. Wayman took this agreement around to the various manufacturers separately, at their several places of business, and secured its execution by those companies, the names of which appear upon the Exhibit, between March 2d, 1910, and March 17th, 1910, inclusive (v. IV., pp. 147-149).

The first consent secured was that of the L. Wolf Manufacturing Company, which is located at Chicago, in

which city the paper was prepared. This was procured by Mr. Wayman on March 3rd, 1910, without consultation by that Company with any of the other manufacturers of Sanitary Enameled Iron Ware (v. I., p. 28, v. IV., pp. 146, 147); and none of the other companies executing the agreement conferred or consulted with any of their competitors before signing the same (v. IV., pp. 146, 147, 148).

After Mr. Wayman had procured the execution of the paper, Petitioner's Exhibit No. 3, he prepared a form of License Agreement and of a Jobber's License Agreement, for the use of the inventions covered by the Arrott, Ditheridge and Lindsay patents, which were modeled upon the forms of similar agreements which had been used by the Western Electric Company and the Seamless Steel Bath Tub Company (v. IV., p. 121, Defendants' Exhibit No. 20).

Having done this, he consulted Mr. Edwin E. Jackson, Jr., of the firm of Noble, Jackson & Hubbard, New York City, who had had a number of years experience with similar licenses, and who suggested certain changes and modifications in the forms of the proposed License Agreement and Jobber's License Agreement prepared by Mr. Wayman (v. I., pp. 138, 139; v. IV., pp. 152, 218).

Mr. Jackson directed Mr. Wayman's attention to a number of cases in which similar license agreements had been sustained by the Courts, including the case of *Rubber Tire Wheel Co. vs. Milwaukee Rubber Works Co.* (C. C. A., 7th Cir., April 16, 1907), 154 F., 358; *Indiana Mfg. Co. vs. J. I. Case Threshing Mach. Co.* (C. C. A., 7th Cir., April 16, 1907), 154 F., 365; *Goshen Rubber Works Co. vs. Single Tube Automobile & Bicycle Tire Co.* (C. C. A., 7th Cir., Oct. 29, 1908), 166 F., 431; *Victor Talking Mach. Co. vs. The Fair*, 123 F., 424; and *Heaton Peninsular Co. vs. Eureka Specialty Co.* (C. C. A.), 77 F., 294; and advised him that if the patents under which he proposed to give licenses covered inventions which were necessary to the successful manufacture of Sanitary Enameled Iron Ware, that the proposed License Agreements were lawful, and that Mr. Wayman, as the owner of such patents, would have the right to prescribe the terms and conditions which were included in said License Agreements (v. IV., pp. 153, 154).

Mr. Wayman also consulted Mr. Byrnes, of Bakewell &

Byrnes, Mr. Christy, of Christy & Christy, and Gov. Lyon, of Lyon & Hunter, by all of whom he was advised the license agreements were lawful (v. IV., p. 153); and Mr. Wayman had never heard their legality questioned until Mr. Kohler suggested it (v. I., pp. 97, 109, Petitioner's Exhibits Nos. 53, 61; v. IV., pp. 113, 193).

Mr. Wayman had the License Agreement and the Jobber's License Agreement, as changed and modified at his conference with Mr. Jackson, printed as sample copies of the proposed License Agreement and Jobbers' License Agreement, and sent such sample copies on or about March 24, 1910, to each of the Sanitary Enameled Iron Ware manufacturers whom he hoped would take licenses from him, with a letter requesting them to come to the Hotel Astor, New York, on March 29 and 30, 1910, where he hoped to further explain his patent licenses in the expectation of procuring their acceptance (v. I., pp. 36, 41, 97, Petitioner's Exhibit No. 54).

He arranged to have Mr. Jackson present at the conference to advise those present as to the legal questions involved (v. I., p. 73; v. IV., p. 218).

Numerous representatives of various manufacturers of Sanitary Enameled Iron Ware met Mr. Wayman at the Hotel Astor on March 29, 1910, and Mr. Jackson then and there explained the legal situation with regard to licenses under patents, citing various cases, among others those hereinbefore referred to (v. I., pp. 73, 228, 239, v. IV., p. 218). Mr. Jackson asked if the invention covered by the Arrott patent was necessary to the successful and economical manufacture of Sanitary Enameled Iron Ware, and, upon receiving reply from several of the manufacturers present that it was, stated that if that was so, the proposed License Agreements were entirely legal.

Some of the manufacturers, after Mr. Jackson had finished his statement, asked him questions which he answered (v. I., p. 228).

After Mr. Jackson left, the matter was discussed generally, and it being apparent that on account of the number of those present definite results as to the details of the proposed License Agreements could not conveniently be settled, and it being necessary, in order to induce a large number of manufacturers to take licenses, that the licenses should be substantially uniform, Mr. Wayman suggested a committee of

five manufacturers to represent the manufacturers in conferring with Mr. Wayman as to the details of the License Agreements, and suggesting to him what would be satisfactory to the manufacturers. This was the Committee which afterwards met and held sessions at Mt. Clemens, Michigan, from about April 8th to April 14th, 1910, and elsewhere later (v. I., pp. 17, 44, 46; v. IV., p. 195).

This Committee met with Mr. Wayman at Mt. Clemens, Michigan, where various manufacturers were consulted as to the preferential discounts desired by their companies, letters from others were considered, and the Committee and Mr. Wayman agreed upon the theory upon which the prices to be established by Mr. Wayman should be figured, and the Committee made various suggestions as to the preferentials; and Mr. Wayman after considering the same, fixed the preferentials (v. I., pp. 67, 68; v. IV., p. 183).

At Mt. Clemens Mr. Hoelscher suggested that Mr. Wayman transfer his options to a holding company. Mr. Wayman refused to do this, but he suggested that he would employ an Advisory Committee of manufacturers to assist in the administration of the licenses. He took up the matter with his counsel, and between them the paragraph as to the commission was prepared as it is in the License Agreement (v. I., pp. 45, 46; v. IV., pp. 206, 207).

Mr. Wayman proceeded to put the License Agreement and the Jobbers' License Agreement in final form, and on April 16, 1910 (v. I., pp. 74, 75, 103; Petitioner's Exhibit No. 31), sent a letter to the manufacturers of Sanitary Enameled Iron Ware stating that meetings had been held at Mt. Clemens beginning April 8, 1910, and ending April 14, 1910, and that additional meetings would be held April 19, 1910, at Pittsburgh, and on Thursday, April 21, 1910, at New York, which would conclude preliminaries, and stating that a meeting would be held in New York during the first week in May for the purpose of executing the final License Agreement papers.

Some of the manufacturers were not using the automatic process, others were using the invention covered by the patent without the permission of the owners of the patent, others were using devices which infringed the Arrott patent, and had been notified by the owner of the Arrott patent to cease such infringement on penalty of being sued, others had compro-

mised with the owners of the Arrott patent and, though not formally licensed, were paying the owner of the Arrott patent for the right to use the patent, or had paid the owner of the Arrott patent for the past use of the invention covered by the patent, and all knew the patent had been sustained by the Courts (v. IV., p. 134).

Mr. Wayman had induced Mr. Dawes, pending the negotiations for the purchase of the Arrott patent, to refrain from suing the infringers (v. IV., p. 134), and urged, as inducements to the manufacturers to take licenses from him under the Arrott patent, the fact that those who had been unlawfully using the invention, or who had been using an infringing device, would be relieved from any liability for damages for past infringement, and would be legally entitled to use the invention; that others who had not had the benefit of the use of the invention would secure such benefit upon reasonable terms, and that all would benefit by the elimination of "seconds" (v. IV., pp. 167-173, 204).

About the middle of March, 1910, Mr. Wayman, having secured individual agreements with a majority of the manufacturers of Sanitary Enameled Iron Ware to take licenses from him under the Arrott, Lindsay and Ditheridge patents, decided to exercise his options to purchase said patents, and procured the preparation of the proper agreements and assignments of said patents to be drawn by Messrs. Bakewell and Byrnes, patent attorneys of Pittsburgh, Pennsylvania (v. I., pp. 27, 32; v. IV., p. 151).

The form of agreement to assign and the assignment of the Arrott patent were delivered, about the time of its preparation, to Mr. Dawes, who referred it to Messrs. Christy & Christy, patent attorneys of the Standard Sanitary Manufacturing Company, who retained it for examination, and did not return it until about the time it was executed, May 4th, 1910 (v. IV., p. 151).

Having substantially concluded his arrangements to secure control of the letters patent named, and to grant licenses thereunder, Mr. Wayman applied to Mr. Sloman for the financial aid promised. Mr. Sloman said that he did not have the cash, but could loan Mr. Wayman stock upon which he could borrow the necessary money. The stock to which Mr. Sloman referred was stock of the Universal Electric Welding Company,

worth, at that time, about $75 a share. Mr. Sloman was a large borrower at the People's Bank of Detroit, Michigan, where he lived. For this reason it was not deemed advisable to offer said Electric Company stock to said Bank as security for a loan. Mr. Wayman had arranged for a loan with the President of the Bank. In this situation on May 2d, 1910, he applied to Mr. W. A. Myler, one of the defendants in this suit and the Treasurer of the Standard Sanitary Manufacturing Company, for a loan of Standard Sanitary Manufacturing Company stock, as that stock had a rating upon the market and would undoubtedly be accepted as collateral by the People's Bank of Detroit (v. I., pp. 135-139, 172, 178; v. IV., pp. 177-182, 198; Defendants' Exhibits Nos. 23-27).

Mr. Myler agreed to personally loan Mr. Wayman 100 shares of the stock of the Standard Sanitary Manufacturing Company, which was his personal and individual property, and to accept as security for said loan 300 shares of the Universal Electric Welding Company stock, which Mr. Sloman had given Mr. Wayman (v. IV., pp. 177-182).

Mr. Wayman then delivered to Mr. Myler the 300 shares of Electric Welding Company stock, and received from Mr. Myler 100 shares of the Standard Sanitary Manufacturing Company stock, which he sent to the People's Bank of Detroit as collateral for a loan of $7,000 which was made to him by said Bank (v. IV., p. 177).

Out of this $7,000 Mr. Wayman paid the Standard Sanitary Manufacturing Company $5,000 for the assignment of the Arrott patent, and gave his note for $5,000 (since paid on its due date) for the balance of the consideration of $10,000, for the assignment of the said patent to him by the Standard Sanitary Manufacturing Company (v. I., p. 136).

The agreement to assign and the assignment of the Lindsay patent were prepared by Messrs. Bakewell & Byrnes, about the middle of March, 1910, and were delivered to the L. Wolff Manufacturing Company, but were not executed until on or about May 5, 1910, when the consideration was paid out of the above-mentioned loan of $7,000 (v. IV., p. 151).

The agreement to assign and the assignment of the Ditheridge patent were prepared by Messrs. Bakewell & Byrnes about the same time as the others, and were delivered to Mr. Hammann of the J. L. Mott Iron Works. Mr. Ham-

mann misplaced the papers and duplicates were afterwards prepared and sent to the J. L. Mott Iron Works, which were executed on or about May 5, 1910, at the same time that the consideration was paid and the License Agreements executed by the J. L. Mott Iron Works (v. I., p. 136).

On May 6, 1910, thirteen of the manufacturers of Sanitary Enameled Iron Ware complied with the request of Mr. Wayman, and sent their representatives to New York City where, at the offices of Messrs. Noble, Jackson and Hubbard, the License Agreements were executed by them and Mr. Wayman (v. I., pp. 41, 111, 157).

At the time the License Agreements (Petitioner's Exhibit No. 9) were executed the Jobbers' License Agreements (Petitioner's Exhibit No. 10) and the Price List (v. I., p. 210; Petitioner's Exhibits Nos. 41, 133), were not entirely completed, but the theory on which they were being prepared was explained to the Licensees (v. IV., p. 269), and that they would form a part of the License Agreements.

The Price-List (Petitioner's Exhibit No. 41,133), establishing the price to plumbers (Petitioner's Exhibit No. 41,133; v. II., p. 76), contained approximately 300 pages with over 35,000 discount calculations giving delivery prices at all jobbing points in every State, and equalizing rates to approximately 4,000 towns (Petitioner's Exhibit No. 43, v. I., p. 89; v. IV., p. 269), and was therefore, work requiring time, and Mr. Wayman, with six assistants, spent four weeks' time in its preparation. None of the Licensees participated in its preparation, the prices were entirely fixed by Mr. Wayman, and none of the Licensees knew until the receipt of the Price List what the prices would actually be.

At the meeting of May 6, 1910, and after the License Agreements had been executed, the Commission provided for in the License Agreements (Petitioner's Exhibit No. 9) was elected by ballot by the Licensees, the same persons who had formed the Committee which met at Mt. Clemens being selected, at Mr. Wayman's suggestion that they were entirely familiar with all the terms and provisions of the License Agreements, etc. (v. I., pp. 45, 46).

This Commission had no relation to, nor was it suggested by, nor did it have the same power as, the Executive Committee referred to in Petitioner's Exhibit No. 109 (v. IV., pp. 216,

217). The powers of the Commission were merely advisory and Mr. Wayman finally determined what should be done, except that as to prices and discounts he could not act without the consent of a majority of the Commission (v. I., pp. 47, 66, 85, 86).

Immediately upon the execution of the License Agreements Mr. Wayman proceeded to perfect and to have printed the Price Lists. (v. I., p. 89; v. IV., p. 269; Petitioner's Exhibits Nos. 41, 133).

It was found impossible to have the License Agreement go into effect before June 1st, 1910, or the Jobber's License Agreement before June 6th, 1910, on account of the amount of work which it was necessary that Mr. Wayman should do before they could be put in operation; but Mr. Wayman immediately proceeded to issue bulletins advising the Licensees and the Jobbers when the License Agreements and the Jobbers' License Agreements would go into effect (v. I., pp. 89, 91; Petitioner's Exhibits Nos. 43, 44), instructing the Licensees as to the instructions to be given by them to the Jobbers when the Jobbers' License Agreements were sent out, and which instructions Mr. Wayman himself prepared, (v. I., p. 91; Petitioner's Exhibit No. 46), notifying the Licensees to have the automatic dredger with the necessary accessories at once installed (v. I., p. 205; Petitioner's Exhibit No. 125), which was done forthwith; preparing and issuing a circular of general instructions to the jobbing trade, explaining the purposes which it was sought to accomplish by the License Agreements and the method of operation thereunder (Petitioner's Exhibits Nos. 45 and 213, v. II., p. 332).

The provisions in the License Agreements as to prices were intended to enable the Licensees to make a reasonable profit, so that they would be able to maintain and improve the quality of the ware, and pay the royalties reserved (v. IV., pp. 231, 232). The royalties were, when the testimony was taken, still being paid (v. IV., pp. 241, 242).

On or about June 20, 1910, a conference was held at the offices of Messrs. Noble, Jackson & Hubbard, between Mr. Grosvenor and Mr. Darling, on the part of the Government, Mr. Jackson and Mr. Noble, on the part of Mr. Wayman, and Mr. Wayman himself.

The situation was gone over with Mr. Grosvenor and he

was furnished with a number of papers. Afterwards other papers which he desired were furnished him, until the Department of Justice had, either through oral explanation or the papers furnished it, a complete knowledge of the facts in the case.

It was after this, and on or about July 22, 1910, that the Government filed its petition in Equity in the Circuit Court of the United States for the District of Maryland, alleging the facts hereinbefore stated to constitute combination and conspiracy to restrain interstate trade and commerce, and an attempt to monopolize a portion of such trade in violation of the Sherman Anti-Trust Act.

On or about December 6, 1910, indictments were found in the District Court of the United States for the Eastern District of Michigan against the same defendants upon the same matters, transactions and things upon which this proceeding was based (v. III., p. 428). This was while the Government was still taking its testimony, though it had nearly completed it. The defendants had had no opportunity of taking any testimony in support of their defense.

When it was endeavored to obtain the testimony of certain defendants in support of the defense, the witnesses were warned by a representative of the Government that any testimony they might give which was relevant in the civil case might and probably would be relevant in the criminal cases, and that inasmuch as they were defendants in each case the testimony given might and probably would tend to incriminate them and might be used against them in the criminal cases, or it might lead to the discovery of other evidence which might be used against them and other defendants in the trial of the indictments (v. III., pp. 428, 429, 437, 446, 447, 453, 454, 461, 462, 471, 481, 491, 502, 514, 519; v. IV., 1, 2, 12); and in consequence of said warning the defendants refused to testify.

At the hearing in the Court below a motion was made, on account of the foregoing facts, for an enlargement of the time of the defendants to complete the taking of their testimony, and for the postponement of the hearing of the case until after the completion of the defendants' testimony (v. A., pp. 102, 103) of which motion the Court said in the majority opinion, "This motion we cannot grant" (v. A., p. 123), giving as a reason that the Sherman Act provided for both crim-

inal and civil proceedings, and it was for the Attorney General to decide whether one or both should be brought.

There was no suppression of competition or absolute fixing of prices, as alleged in the petition (v. A., p. 7) and found by the Court below (v. A., p. 112 ; v. IV., pp. 35, 36, 37, 40, 46, 51, 53, 55, 60, 61, 68, 88, 93, 187, 188, 190, 191, 219, 229, 221).

The defendant Wayman conceived the idea, communicated it to the corporation defendants and their officers, and urged the matter upon them until he finally persuaded them to enter into the licenses. None of the licensees had anything to do with the matter save as moved by Wayman (v. III., pp. 477, 485, 494 ; v. IV., pp. 6, 17).

Attached to appendices A and B are the charge of Judge ANGELL on the trial of the conspiracy indictment and the decision of Judge DENISON on the demurrer to the indictments.

The Court below expressly refused to pass upon the allegations in the petition that the use of the patents was a mere device or subterfuge (v. A., p. 123), basing the conclusion reached by the majority upon the ground that the patents gave their owner no right to impose restrictions upon the terms and conditions upon which and the price at which the product of the use of the invention should be sold ; and upon the further ground that without the patents the agreements were within the Sherman Act (v. A., pp. 113, 122, 123).

On the foregoing facts the majority of the Court below reached its conclusions by considering the manufacturers' and jobbers' license agreements as the basis of this proceeding. It concluded that these agreements were made to fix prices and to suppress competition and for no other purpose, and consequently violated the provisions of the Sherman Act, unless the patent laws gave to the Licensor the right to make such license agreements.

The Court below erred in finding that the agreements destroyed competition and improperly fixed prices ; that they were made for either or both of those purposes, and in failing to consider the situation of the parties to the agreements, the condition of the trade in sanitary enameled iron ware, and all the facts and circumstances surrounding the transaction.

The Court below further erred in finding that agreements affecting competition or fixing prices are necessarily injurious to the public interests, and void without regard to whether or

not they are economic arrangements made for the benefit of the parties thereto in the regulation of their trade, and merely incidentally affecting others.

The Court below further erred in not giving their proper weight as evidence to the sworn answers of the defendants.

The Court further erred in reaching the conclusion that the owner of a patent could not protect his invention by making agreements which controlled the product of the use of his invention, although admitting that by the use of that invention the product was better than if made by any other known method of manufacturing sanitary enameled iron ware; and that the invention covered by the letters patent was useful, enabled the manufacturer to manfacture more economically, in greater quantity in the same time, and permitted the labor of manufacturing to be performed under better conditions both to the manufacturer and to the laborer.

The Law of Patents.

The most recent decision of this Court upon the principle involved in the case at bar, under the patent laws of the United States, is *Henry vs. A. B. Dick Co.*, 224 U. S., 1.

The principle announced in that case is supported not only by reason but by numerous decisions in the Federal Courts. It controls, we submit, the case at bar, and attention is directed to the fact that after the opinion was delivered the plaintiff in error asked leave to file a petition for a rehearing, and the Attorney General and the Solicitor General filed an application and a brief on behalf of the United States for leave to intervene and for a rehearing of the cause; both applications were denied.

The case involved the question whether the owner of Letters Patent covering the rotary mimeograph could sell the machine involving the invention under a license restriction that it might be used only with certain unpatented materials made by the owner of the Letters Patent; the case presented the question of the extent of the patentee's privilege and turned upon the scope of the monopoly or privilege secured to the patentee.

The case came to this Court upon a certificate from the Circuit Court of Appeals in the Second Circuit to get the question which had been decided in so many Circuit Courts and Circuit Courts of Appeal finally disposed of.

The Court pointed out (p. 18) that

> " The books abound in cases upholding the right of a patentee owner of a machine to license another to use it subject to any qualification in respect of time, place, manner or purpose of use which the licensee agrees to accept. Any use in excess of the license would obviously be an infringing use and the license would be no defense * * *."

The Court after pointing out the distinction between the property right in the materials composing the patented machine and the right to use for the purpose and in the manner pointed out by the patent, and stating that the license may be to make, sell and use, or it may be limited to any one of these separable rights, says (p. 24) :

> " The property right to a patented machine may pass to a purchaser with no right of use, or with only the right to use in a specified way, or at a specified place, or for a specified purpose. The unlimited right of exclusive use which is possessed by and guaranteed to the patentee will be granted if the sale be unconditional. But if the right of use be confined by specific restriction, the use not permitted is necessarily reserved to the patentee * * * (p. 25). This right to sever ownership and use is deducible from the nature of a patent monopoly and is recognized in the cases * * * (p. 26). Where, then, is the line between a lawful and an unlawful qualification upon the use? This is a question of statutory construction. But with what eye shall we read a meaning into it? It is a statute creating and protecting a monopoly. It is a true monopoly, one having its origin in the ultimate authority, the Constitution. Shall we deal with the statute creating and guaranteeing the exclusive right which is granted to the inventor with the narrow scrutiny proper when a statutory right is asserted to uphold a claim which is lacking in those moral elements which appeal to the normal man? Or shall we approach it as a monopoly granted to subserve a broad public policy, by which

> large ends are to be attained, and, therefore, to be construed so as to give effect to a wise and beneficial purpose? That we must neither transcend the statute, nor cut down its clear meaning, is plain." * * *

The Court then proceeds to cite with approval *Bement vs. National Harrow Co.*, 186 U. S., 70; *Button Fastener Case*, 77 F., 288; *Paper Bag Case*, 210 U. S., 405; and other cases; and calls attention to the fact that in the *Bement Case* the purpose and effect of the combination and of the contracts between the parties was to fix and keep up the prices at which the licensees might sell the patented harrows, and that although it was claimed that the combination and contracts were obnoxious to the Sherman Act that this Court ruled otherwise, and continues (p. 31):

> "If a stipulation in an agreement between the patentees and dealers in patented articles, which, among other things, fixed a price below which the patented articles should not be sold, would be a reasonable and valid condition, it must follow that any other reasonable stipulation, not inherently violative of some substantive law, imposed by a patentee as a part of a sale of a patented machine, would be equally valid and enforceable. It must also follow, that if the stipulation be one which qualifies the right of use in a machine sold subject thereto, so that a breach would give rise to a right of action upon the contract, it would be at the same time an act of infringement, giving to the patentee his choice of remedies."

And of the argument that a condition restricting the licensee to use the patented machine only in connection with supplies made by the patentee gives to the patentee the power to extend his monopoly so as to cause it to embrace any subject not within the patent which he chooses to require the invention shall be used in connection with, the Court says (p. 31):

> "Of course, the argument does not mean that the effect of such a condition is to cause things to become patented which were not so without the requirement."

The Court points out that the supplies will still continue to be unpatented, that any one will be as free to make, sell and use like articles as they would be without this restriction, save in one particular, namely, that they may not be sold to the licensee of the patentee's machine with the intent that they shall be used in violation of the license.

By selling the machine covered by the Letters Patent subject to the restriction imposed by the patentee, he took nothing from the public and in nowise restricted their legitimate market. The Court points out that the public is always free to take or refuse to take advantage of the invention on the terms imposed. If they be too onerous or not in keeping with the benefits, the public will permit the invention to go unused and will thus lose nothing which it had before until the patent expires, when the public will be free to use the invention without compensation or any restriction, and the Court says (p. 35).

> "The conclusion we reach is that there is no difference, in principle, between a sale subject to specific restrictions as to the time, place or purpose of use and restrictions requiring a use only with other things necessary to the use of the patented article purchased from the patentee. * * * That a violation of any such restriction annexed to a sale by one with notice constitutes an infringing use has been decided by a great majority of the Circuit Courts and Circuit Courts of Appeal, and has come to be a well-recognized principle in the patent law, in accordance with which vast transactions in respect to patented articles have been conducted. * * * A line of decisions, which has come to be something like a rule of property, under which large businesses have been conducted, should at least not be overruled except upon reasons so clear as to make any other construction of the patent law inadmissible."

The foregoing case, we submit, decides the principle which will dispose of this case. It holds that the owner of Letters Patent can control unpatented articles used in connection with the machine embodying his invention.

In the case at bar the owner of the Letters Patent sought to control only the product made by the use of his invention, namely, to prescribe the terms upon which sanitary enameled iron ware, in the final step in the manufacture of which his invention, giving to the manufactured product its character, was used, could be disposed of. In *Henry vs. Dick (supra)*, the articles controlled used in connection with the machine embodying the invention were not changed in their character by the use of the invention. In the case at bar the iron casting is changed into apparently an article made of porcelain, better in quality, more cheaply and expeditiously manufactured, under better conditions to the workmen, and of greater uniformity of excellence than can be made by any other known process; and the restrictions applied to articles produced by the use of the patented invention and were reasonably adapted to extend the use of the invention and enhance its value and protect the owner of the Letters Patent in his ownership. If, as held in *Henry vs. Dick*, the owner of Letters Patent may restrict the use of the patented invention to use only with unpatented supplies purchased from the owner of the Letters Patent for use in connection with the patented article, the owner of the patents, in the case at bar, has not attempted to extend the scope of the production of the patent as far.

The constitutional idea of a time monopoly in a new creation is profoundly wise, as all experience has demonstrated. The right to withhold the use of an invention necessarily involves a right to attach to its use any condition however arbitrary, for the public is none the poorer if the invention is never used, whereas it may be benefited if the invention is brought into use on any terms; and in any event the monopoly lapses with the lapse of time, or is perhaps made valueless by a newer invention inspired by the one it supersedes.

This Court in *Henry vs. Dick, supra*, indicates somewhat the substratum of judicial precedent that made its pronouncement inevitable, but reference to a few of the underlying decisions may not be out of place :

Bloomer vs. McQuewan, 14 How., 539, 548.
United States vs. American Bell Telephone Co., 167 U. S., 224.

Rubber Tire Wheel Co. vs. Milwaukee Rubber Works Co., 154 F., 358.
Goshen Rubber Works vs. Single Tube Automobile & Bicycle Tire Co., 166 F., 431.
Indiana Mfg. Co. vs. J. I. Case Threshing Machine Co., 154 F., 365.
U. S. Consol. S. R. Co. vs. Griffin & Skelley Co., 126 F., 364.
Rupp & Wittgenfeld Co. vs Elliott, 131 F., 730.
New Jersey Patent Co. vs. Schaeffer, 159 F., 171.
New Jersey Patent Co. vs. Schaeffer, 178 F., 276.
Victor Talking Machine Co. vs. The Fair, 123 F., 424.
Fonotipia Ltd. vs. Bradley, 171 F., 951.
National Phonograph Co. vs. Schlegel, 128 F., 733.
Edison Phonograph Co. vs. Pike, 116 F., 863.
Edison Phonograph Co. vs. Kaufmann, 105 F., 960.
The Fair vs. Dover Mfg. Co., 166 F., 117.
Commercial Acetylene Co. vs. Autolux Co., 181 F., 387.
Æolian Co. vs. Harry H. Juelg Co., 155 F., 119.
Crown Cork & Seal Co. vs. Brooklyn Bottle Stopper Co., 172 F., 225.
Crown Cork & Seal Co. vs. Standard Brewery, 174 F., 252.
Crown Cork & Seal Co. vs. Standard Stopper Co., 136 F., 841.
Cortelyou vs. Lowe, 111 F., 1005.
Cortelyou vs. Carter, 118 F., 1022.
Cortelyou vs. Johnson, 138 F., 110; 145 F., 933.
Brodrick Copygraph Co. vs. Roper, 124 F., 1019.
A. B. Dick Co. vs. Milwaukee Co., 168 F., 930.
B. V. D. Co. vs. Wolf & Co.,
Indiana Mfg. Co. vs. Nichols & Shepard Co., 190 F., 579.
Automatic Pencil Sharpener Co. vs. Goldsmith Bros., 190 F., 205.
Thomas A. Edison, Inc. vs. Smith, 188 F., 925.
Waltham Watch Co. vs. Keene, 191 F., 855.
Fuller vs. Berger, 120 F., 274.
Broderick Copygraph Co. of N. J. vs. Mayhew, 131 F., 92; affd. 137 F., 596.

Arrott Patent, Validity of.

No attack is or could be made upon the validity of the patents, because the Arrott patent has been upheld by the Courts. The Circuit Court of Appeals for the Third Circuit (BUFFINGTON, J.) held that the invention covered by the patent

rose to the " plane of the humane " and revolutionized the art to which it belonged (J. L. Mott Iron Works vs. Standard Sanitary Mfg. Co., 159 F., 135; Defendants' Exhibit No. 13, v. IV., p. 294; see also v. III., p. 116).

The petition alleges, and the petitioner sought to prove, that

> " These patents, and the tools they cover, while useful and valuable in the manufacture of Sanitary Enameled Iron Ware, are not essential thereto."

This made it necessary for the defendants to show the character of the invention covered by the patents.

The Inventions covered by the Patents are automatic devices adapted to distribute enameling powder over the surface of the various articles of sanitary enameled iron-ware while at a very high temperature.

Sanitary Enameled Iron-Ware " is made of cast iron. It is coated with enamel. It has the appearance of being porcelain lined. Bath tubs, lavatories, sinks, closet bowls and tanks, and urinals, are among the more important articles made of it " (v. A, p. 104).

The Arrott invention in its aspect as a patentable invention and its mode of operation is described at length by Mr. Edward M. Bentley (v. III., pp. 349–358).

Mr. Bentley graduated at Yale in 1880. He was then for several years an assistant examiner in the United States Patent Office, after which he was engaged for six years in the manufacturing business as one of the originators and owners of the Bentley-Knight Electric Railway Company which built a number of the first successful electric railways in the United States. In 1889 he became connected with the Thomson-Houston Company, and afterwards with the General Electric Company, with which two Companies he continued for five years as Manager of the Department of Inventions and Patents; and since 1894 he has been practising his profession as a patent expert and, as such, made a special study of the art with reference to the Arrott patent (v. III., pp. 349–351).

Mr. Bentley, after pointing out the elements which con-

stitute the value of an invention in a particular art, says of the Arrott invention that it (v. III., p. 369)

> "has created a new standard in this particular art, and as in all arts the creation of such a new standard renders the prior methods obsolete although they still remain practical. For example, it is still possible to propel street cars by horses and it is still done in some cases. Yet the introduction of the electric motor as a propelling agency for street cars has created a new standard that has rendered horse propulsion obsolete."

J. W. Arrott, Jr., the inventor of the Arrott dredger was at the time of making the invention Superintendent of the Enameling Department of the Standard Manufacturing Company, afterwards the Standard Sanitary Manufacturing Company, had been engaged in that business for ten years, and was familiar with the needs of the art and the defects to be overcome, and, in the Arrott dredger solved the questions so satisfactorily that nothing has been found since the invention that is equal to it or which is equivalent to it in the manufacture of sanitary enameled iron ware (v. [illegible] p. 116, 117, 139, 140, 413–417).

The Court below said that the record did not enable it to tell in either absolute or relative figures or percentages how great the saving of time or the bettering of quality was (v. A, p. 116).

In this it erred, as a reference to the testimony of various workmen, and that of Mr. Arrott and Professor Staley, will show (v. III., pp. 293, 294, 415).

Prior to the invention covered by the Arrott patent the distribution of enameling powder over the article to be enameled was done by hand. The original dredge consisted simply of a sieve about 9 inches in diameter with a wooden handle about 3½ or 4 feet long, which was held by the workman in one hand with the end resting under his elbow and the hand turned down with about the middle of the handle resting in the hand. To distribute the powder the sieve was filled to within about 1½ inches of the top with enameling powder weighing from 8 to 10 pounds, and the workman moved the dredge over the article to be enameled in one hand by a hori-

zontal movement while with the other hand he kept up a vertical movement rapping the handle of the dredger with an iron loop which surrounded the handle (v. III., pp. 3, 4, 106, 107, 108, 111, 123, 140, 184, 355, 356; v. IV., Defendants' Exhibit No. 6; and Petitioner's Exhibit No. 278).

We will take bath tubs as an instance to illustrate the method of enameling, though what is said is equally applicable to all articles.

The base is moulded of cast iron upon which a flush coat is put, after which it is heated to a bright cherry red, about 1500 degrees fahrenheit (v. III., pp. 22, 108, 165). This is done in a furnace in the center of which are placed two rails or angle irons for the purpose of raising the bottom of the tub from the bottom of the furnace (v. III., pp. 16, 17).

The tub is then placed upon a movable table capable of being turned towards the workman who enamels the inside of the tub, and also around so as to present the whole of the surface of the tub for enameling (v. III., pp. 17, 18, 19).

In using the dredge above described the workman had to stand so near the red hot iron that he was obliged to wear protective devices (v. III., pp. 22, 70, 108, 134, 169, 401; Defendant's Exhibit No. 6). The work was very exhausting and after enameling a tub the workman would have to go out in the air, remove the protective clothing and sit down and rest, during which time the furnace was necessarily idle (v. III., pp. 23, 28, 33, 107, 146, 147, 165, 167, 175, 176, 180, 187, 224, 227, 237, 238, 246, 397, 409, 414).

For the purpose of moving the workman farther from the heated tub a long handled dredge was introduced in some factories which differed from the former in that its handle was of seamless tubing and about 7 feet long, and the sieve about 10 inches in diameter, and a counterweight was provided which assisted the workman in supporting the weight (v. III, pp. 4, 5, 23, 24, 58, 60, 87, 95, 184, 185; Defendants' Exhibits Nos. 8 and 9; Petitioner's Exhibit No. 279).

The suspending by the counterweight was both an advantage and a disadvantage. When the sieve was full of powder it relieved the workman of the necessity of supporting the weight. As the weight of the powder decreased in the operation of enameling a tub, a point came when the counterweight was greater than the weight to be supported.

This and the influence of the counterweight connection interfered with the workman's control over the dredge in moving it over the article to be enameled, so much so that one workman testified that after trying it he declined to use it, and it came to be known among the workmen as " a man killer " (v. III., pp. 95, 116, 140, 153).

As stated by the Court below, the manufacturer of enameled ware wants

> " to use little power. It is more or less costly. The thinner the enamel coat the better the ware looks and lasts. The whole surface of the article must be covered otherwise it would be almost or altogether useless. The more uniform the coat of enamel is the more sightly and durable it will be. If little powder is to cover the entire surface it must be applied in a finely divided form. Every portion of the surface must receive as nearly as may be precisely the same amount of powder as any other portion of like extent. The sprinkling must therefore be done with great evenness and regularity. It must be done quickly. The powder will not attach itself firmly to the base unless fused upon it. If every minute portion of the surface is to be covered the powder must melt and run in liquid form the minute it touches the article. The sprinkling must consequently be done and finished while the article remains hot enough to liquify the enamel the instant the latter touches the former. For this purpose a minimum temperature of 1200 degrees F. is required " (v. A, p. 114).

That the foregoing result is obtained by the use of the Arrott invention is amply sustained by the testimony.

As stated by the witness Jobe (v. III., pp. 105, 113, 115), who, at the time of his testimony was General Superintendent of the National Sanitary Manufacturing Company, having had seventeen years experience in the enameling business

> " the scientific principle of enameling is to apply the enameling while the tub is at the hottest degree to which you can bring it ; that is when you get the amalgamation of the enamel and the iron and the first coat

is what does it. That is the coat that goes into the iron while the tub is hot and the sooner you can apply it the better is the result, the more sanitary is the article and it will not wear off. * * * It is an advantage" (to have two fine coats instead of three) "in this respect, in that it gives the enamel more show to fit the iron. This enamel will have a greater tendency to hold to the iron and will expand more readily and easily."

On account of the awkward position of the enameler, he had to move from place to place in endeavoring to cover the inside of the tub with the enameling powder, and it took him so long that the tub would become chilled before he could put on as much enameling powder as was desirable, and consequently the powder would not fuse and become properly bonded to the tub, and it was necessary to put the tub back in the furnace (v. III., pp. 12, 109, 116).

The powder came out in "puffs," "bunches," "clumps," "lumps," "clots," or intermittently, as the handle of the sieve was struck (v. III., pp. 7, 111, 164, 166, 173, 357; Defendants' Exhibits Nos. 6, 8, 9). The powder was distributed upon the tub unequally. It was hard to place just as desired. It was impossible to get an even, thin coat, which is essential to good enamel ware (v. III., pp. 7, 8, 110, 111, 146, 148, 149, 154, 164, 173, 179, 184, 185, 188, 193, 240, 247, 330, 336, 384, 399, 404, 406, 410). It was very rare that a smooth tub was made (v. III., p. 15). If the powder was coarse, the enameler might be unable to rap hard enough to force the powder through, or if the tableman was delayed at all, or if for any other cause there was delay, the enameler would be unable to get over the tub before it became chilled, and the tub would have to be put back in the furnace. He might have got sufficient powder on one side, but not on the other, and the consequence would be that by the time the side which was properly covered was fused in the furnace, the other side would be burned off (v. III., pp. 13, 108). There was danger of getting the powder on thick in some places and thin in others, with the result that if in fusing the powder was applied too thick, it would tend to flow, making a ridge, or streak, on the surface of the enamel, and often was not sufficiently fused to the iron, so that when the tub was lifted by the fork, if it

was set down hard or bumped, the powder would slide tending to form a roll where the side and bottom of the tub joined, and it would be necessary to put the tub back on the table and the enameler with an asbestos cloth, or glove, scrape out the powder and then take a bellows and smooth it out, and practically all of that dredge would be lost (v. III., pp. 15, 16, 20, 110, 149, 155). The enamel when the hand dredges were used was porous and often had what was termed an "egg shell" finish, which is unsanitary (v. III., pp. 11, 21, 22, 83, 84, 113). This never happens when the Arrott dredger is used (v. III., pp. 83, 84).

The Arrott dredger—properly so-called since the workman has ceased to sift the powder and merely holds and guides the machine (v. III., pp. 365, 379, Defendants' Exhibits Nos. 4, 5, 7), is pneumatic, has a bowl 9 inches in diameter, and a hollow steel handle about 4 feet 6 inches long, to the end of which is attached a pneumatic hammer or vibrator which is about 9 inches long, making the total length from the end of the hammer to the bowl of the sieve about 5 feet 3 inches. The handle is provided with a button which controls the hammer, and just back of the enameler the air tube is provided with a valve which controls the quantity of air admitted to the hammer. It is also provided in some factories with a counter-weight (v. III., p. 6). The enameler, therefore, has both hands free to handle the dredger, and in consequence is enabled to stand in one position, and by a movement of his arms carry the dredger over the tub and at the same time, when the air table is used, to operate the foot valve controlling the table (v. III., pp. 6, 14, 62, 102, 358). The sieve in the Arrott dredger is ten meshes to the inch finer than the sieve used with the short, or long handled dredges, enabling the use of a finer powder which fuses more readily, and therefore a harder powder may be used (v. III., pp. 6, 113, 114). The flow of the powder is continuous (v. III., pp. 6, 7, 28, 111, 179, 364) as will readily be seen by reference to Defendants' Exhibits Nos. 4, 5 and 7, and is regulated automatically (v. III., pp. 14, 357). With the hand dredges there was no uniformity; one man might be a great deal stronger than another and be able to beat faster and harder, and in nearly every case the tapping became slower

towards the end of the enameling (v. III., pp. 96, 100, 101, 104, 107, 108, 140).

With the Arrott dredger the powder can be deposited just as desired; it is deposited equally; can be distributed in a thin even coat, which, as has been said, is essential to good enamel ware; produces a far superior enamel to that made with the hand dredges, more durable, smoother and better; can be put upon the tub while it is still hot, and if the powder is coarse, by letting in more air, it can be forced through the sieve. The work can be done more quickly, with less effort; the enameler does not have to be so careful in handling the tub lest he bump it and cause the powder to slide, a greater number of articles are produced in the same time of higher grade; the resulting enamel is hard, solid, lustrous, and more sanitary; larger tubs can be enameled and, at a less price per piece, the enameler makes more money (v. III., pp. 7, 8, 10, 11, 14, 21, 22, 28, 35, 38, 109, 110, 111, 114, 115, 150, 151, 154, 155, 165, 166, 171, 174, 177).

In some of the factories the furnace door is operated by compressed air, controlled by a foot-valve operated by the rim-man or helper. This and the air operated table and the powder dummy were made possible by the use of the Arrott dredger (v. III., pp. 32, 91, 292, 293).

The inventions covered by the Ditheridge and Lindsay patents infringe the invention covered by the Arrott patent (v. III., pp. 358–360).

The inventions covered by the Arrott and other patents are essential and necessary to make good enameled ware. They make articles of enameled ware so much superior (v. III., pp. 8, 113, 120, 187, 191, 222, 229, 230, 232, 238, 248, 249, 332, 337, 339, 381, 391, 400, 415–417) to what was made before their introduction, as to require a new classification. They enable an enameler with less effort (v. III., pp. 110, 165, 166) and under very much better conditions (v. III., pp. 116, 173), to make harder, smoother, evener, and more lustrous enameled ware than can be made without them (v. III., pp. 111, 113, 115, 176, 409). The workman gets more money (v. III., pp. 110, 151, 167, 205, 229, 241, 331), the manufacturer gets a larger number of articles at the same furnace cost, and during the same period of labor (v. III., pp. 109, 117, 151, 165, 174, 176, 181, 187, 188, 228, 229, 239, 247, 248, 330, 332, 337, 381, 382,

399, 409, 410, 416). It may be epitomized by saying, as was testified to by many of the witnesses, that assuming that there had been improvements in the table, in the operation of the furnace, and in the enameling powder itself, the invention covered by the patents in suit was still "essential" to the manufacture of enameled ware, and absolutely "necessary" in order to make sanitary enameled iron ware (v. III., pp. 94, 98, 117, 139, 140, 365).

Professor Staley, Assistant Professor of ceramic engineering at the Ohio State University, testified (v. III., p. 288) that he had had practical experience in enameling while in the employ of the McCrum-Howell Company at Blairsville, Pennsylvania; and afterwards at Uniontown, Pennsylvania (v. III., p. 289); and at the Humphryes Manufacturing Company at Mansfield, Ohio (v. III., p. 288). At Uniontown he was superintendent of the plant from the spring of 1907 until July, 1909 (v. III., p. 288). He said that while at Uniontown, experiments were made to find some device that could take the place of the Arrott dredger, but though they built three or four different devices they could not find anything that gave even approximately the results obtained by the use of the Arrott invention (v. III., p. 291).

He said that the pneumatic dredger made better ware at less cost than either of the hand dredges (v. III., p. 292); that in the case of tubs, it was possible to make a piece of ware with two men instead of three, after installing the auxiliary aids to manufacture such as an air-operated table, and an air-operated furnace door, neither of which could be used without the use of the Arrott dredger (v. III., pp. 292, 293), and a piece of ware could be made in less time, which meant a saving in fuel, a saving in labor, a saving in plant, and the ware could be made with less exertion, which meant a saving in labor, therefore a saving in wages and a saving in cost of maintaining the output, and the ware could be made with less skilled labor, which meant a saving in wages and a saving in cost of maintaining the output (v. III., pp. 292, 293).

After the introduction of the use of the pneumatic dredger the men would not use the hand dredges, and that he would not attempt to operate an enameling plant if he could not have the pneumatic dredger, so essential did he deem it to the successful operation of such a plant (v. III., pp. 297, 302).

The testimony of the workmen called as witnesses, men who had had actual experience with the Arrott dredger and with other means of enameling is so convincing as to the commercial necessity of using the Arrott dredger to make high grade enameled ware, possible only by the use of that dredger, that we would like to summarize in more detail the statement of each witness, but that would make this brief too long.

The testimony of the witnesses covers the enameling of all classes of articles; and, in connection with the motion made at the hearing below for an enlargement of time to take more testimony, we offered to prove by workmen from all the factories of the licensees the same facts as are shown by the witnesses examined, if the Court would grant us an opportunity to take further testimony.

Mr. Bentley pointed out that the Arrott invention is essentially different from the hand dredge, not only in point of novelty (to which we are not addressing ourselves), but as to the manner in which it operates to distribute the enameling powder upon the article to be enameled (v. III., p. 357).

In the hand dredge there is simply a series of intermittent blows which dislodge the enameling powder and cause it to flow through the sieve in puffs, lumps, clots, streaks, etc. (v. III., pp. 7, 111, 146, 148, 166, 176, 357; Defendant's Exhibits Nos. 6, 8, 9), by reason of the impact of the beater against the body of the sieve itself. The Arrott dredger causes a molecular transmission of the blows of the agitator through the handle, which sets the wires of the sieve into a continuous vibration, which dislodge the minute particles of the enameling powder lying upon the sieve and causes them to flow through the meshes of the sieve in a steady stream, this action being uniform throughout the entire mesh of the sieve (v. III., p. 357). The practical difference is that with the Arrott dredger there is a continuous and uniform fall of the powdered enamel from the dredger, in distinction from the intermittent and non-uniform delivery of the enamel by the hand dredge (v. III., pp. 109, 110, 111, 148, 150, 179, 181, 184, 185, 188, 193, 227, 240, 247, 330, 336, 357, 384, 399, 404, 406, 410).

By the use of the Arrott dredger the following advantages over the hand dredger are secured: It is possible to use a lighter casting (v. III., pp. 116, 296); less enameling powder is

used (v. III., pp. 34, 292); the enameling can be done more quickly (v. III., pp. 11, 109, 151, 154, 165, 166, 174); more articles can be enameled in the same time, and thereby a saving in the use of the furnace effected; the enameling can be done with less effort on the part of the workmen, former methods having been described by the workmen as "mankillers" (v. III., pp. 118, 153); there are less rejections (v. III., pp. 32, 109, 174, 176), though the standard required is higher (v. III., pp. 150, 176), many workmen having had no rejections over a considerable period and the average percentage of rejections being not in excess of about 1 or 1½ per cent. (v. III., pp. 36, 79, 92) whereas formerly, by the methods in use prior to the introduction of the Arrott invention, the rejections were on an average about 10 per cent. (v. III., p. 34), and workmen testified that sometimes a whole day's work was rejected and that this was not an unusual occurrence; more money is made by the workmen in less time at less price per piece, and with less effort (v. III., pp. 11, 14, 109, 110, 151, 152, 167, 171, 175, 205, 229, 241, 331); only men of unusual nervous and physical endurance and of good mechanical judgment could be taught, and then with difficulty, to use the method in use before the introduction of the Arrott invention (v. III., pp. 111, 147, 148, 295), whereas with the Arrott invention almost any man can learn in a short time to use it successfully (v. III., pp. 111, 112, 155, 167, 176).

To make high grade, durable and sanitary enameled ware it is necessary that the enamel should be hard, white, lustrous, thin, even and smooth, and not porous.

The testimeny is uniform that this result can only be accomplished commercially by the use of the Arrott dredger.

Finally, the testimony is uniform that as a result of the use of the Arrott dredger ware so much better as to require a new classification is commercially made, more of it in the same length of time and at less cost to the manufacturer, at greater profit to the workmen, at less labor to the workman, and the public gets, in addition thereto, an honest article.

Throughout the testimony of the workmen percentages of savings and of advantages due to the Arrott dredger appear. These are, however, perhaps as well stated as possible in the testimony of Professor Staley, where he discusses: The saving in enamel (v. III, p. 293); the saving in the number of the

crew (v. III, p. 293); the introduction of mechanical appliances not available by the old method (v. III, p. 293); the saving in labor (v. III, p. 293); the saving in time (v. III, p. 293); the saving in plant (v. III, p. 294); the saving in cost of superintendence (v. III, pp. 294, 295, 296); the saving in the trouble and expense of maintaining output (v. III, pp. 295, 296); the saving in the weight of castings (v. III, p. 296); the saving in the use of the furnace (v. III, p. 296); the employment of less skilled labor, consequently less highly paid (v. III, p. 297); the production of better quality ware (v. III, pp. 298, 299); the avoidance of defects (v. III, pp. 298, 299); the preventing of returns of defective ware by dissatisfied customers (v. III, p. 300); the improvement in the quality of the enamel itself (v. III, p. 301), thus rendering it less sensitive to wear and less sensitive to the attack of chemical agencies (v. III, p. 301); and the impossibility of commercially manufacturing Sanitary Enameled Iron Ware without the use of the Arrott dredger (v. III, pp. 301, 302).

A number of employes of the various manufacturers, each one of whom had had practical experience in enameling with both the hand dredges and the Arrott dredger, testified in the case.

The testimony of George Shield, general foreman of the enameling department of the Dawes-Myler Works of the Standard Sanitary Manufacturing Company, at New Brighton, Pennsylvania, who went to work for them in June, 1888, and who had very great experience in the actual work of enameling, appears in Volume III., at pages 1 to 104;

That of John S. Jobe, general superintendent of the National Sanitary Manufacturing Company, who had been in the business about seventeen years, and had a very successful career as an enameler, appears in Volume III., at pages 105 to 142;

That of John J. Mitchell, foreman of the enameling department of the J. L. Mott Iron Works, Trenton, New Jersey, who had fifteen years' experience, appears in Volume III., at pages 143 to 163;

That of Michael J. O'Brien, night foreman in the enameling department of the J. L. Mott Iron Works, at Trenton, New Jersey, who had been an enameler for about twelve years, appears in Volume III., at pages 163 to 171;

That of Patrick Mooney, who had been with the J. L. Mott Iron Works for about twenty-three years, and as an enameler for about twelve years, appears in Volume III., at pages 172 to 179;

That of Anthony Barry, who has been engaged for about seven years in the enameling department of the J. L. Mott Iron Works, at Trenton, New Jersey, appears in Volume III., at pages 179 to 182;

That of Charles A. Fisher, foreman in the works of A. Weiskittel & Sons Company, at Baltimore, Maryland, appears in Volume III., at pages 183 to 223, and 254 to 258;

That of Herman O. Goldsmith, who had been employed by A. Weiskittel & Sons Company for about nine years, during four or five of which he had been enameling, appears in Volume III., at pages 223 to 237;

That of Joseph B. LeBrun, who was employed as an enameler of bath tubs by A. Weiskittel & Sons Company, appears in Volume III., at pages 238 to 244;

That of William Bodine, who had been employed about nine years by A. Weiskittel & Sons Company as an enameler of bath tubs, appears in Volume III., at pages 244 to 252;

That of George J. Blackham, manager of the McCrum-Howell Company, who had been in the enameling business from the time he commenced work, about eighteen years ago, appears in Volume III., at pages 329 to 334;

That of Charles E. Wilkinson, enameling foreman for the McCrum-Howell Company, at Uniontown, Pennsylvania, who had been in the business about six years, appears in Volume III., at pages 335 to 340;

That of Andrew Ramming, foreman of the small ware enameling department of the Standard Sanitary Manufacturing Company, in Allegheny, Pennsylvania, who had been an enameler for eighteen years, appears in Volume III., at pages 408 to 411;

That of Joseph Varley, enameling foreman of the Humphryes Manufacturing Company, who had been enameling since about the time the Dawes-Myler plant was started in 1887, appears in Volume III., at pages 395 to 408; and

That of John C. Reed, manager of the Allegheny works of the Standard Sanitary Manufacturing Company since 1893,

and who was thoroughly familiar with the art of enameling, appears in Volume III., at pages 379 to 394.

All of the foregoing witnesses agree in testifying to the facts above stated. The great value of the Arrott invention is incontestably established.

Resumé.

From the foregoing and the cases cited it is evident that the majority of the Court below over-looked the distinction pointed out by this Court in *Henry vs. Dick*, *supra*, between the property in the material composing the patented article and the right to use the invention covered by the patent.

In the case at bar the defendant Wayman, the Licensor, did not even dispose of the material; he merely granted the right to use the intangible thing—the invention—reduced by the licensees to tangible form and used in the manufacture of their product under certain restrictions as to the disposal of the product, which restrictions the cases hold to be entirely within his right.

The Court below got into the confusion of dealing with the material thing covered by Letters Patent as though it were the invention. The object of the patent laws, passed under the constitutional grant, is to protect the inventor in his idea, in his discovery. His discovery is protected by the Letters Patent and by the patent laws. It is not subject in any way to the Sherman Anti-Trust law. His discovery may take tangible form either in the article manufactured, which is called a patented article, or in the result produced by a process, or in a article produced by the use of the patented article. Any of these material forms may be subject to the laws passed under the police power of the states, as in *Patterson vs. Kentucky*, 97 U. S., 501, and like cases, or the provisions of the Sherman Anti-Trust law when or as soon as he has released them from the monopoly of his patent.

The reason for prohibiting by injunction the manufacture of a patented article, is to protect the inventor in his discovery. The material thing itself is not the invention, but to prevent others from manufacturing that material thing may be the only way of protecting the inventor in his discovery. The owner of Letters Patent covering a process is protected

in his discovery of the process by enjoining a stranger from obtaining the result which may be an unpatented material thing by use of the discovery involved in the process. The inhibition may apply to the material thing which the infringer is making, but the object sought to be, and attained is the protection of the use of the process itself, not the prohibition of the manufacture of the material thing.

Similarly, a patented machine might be the only commercially practical way of manufacturing a particular thing. The thing is unpatented and the result in such a case of prohibiting the making, using or selling of the thing made by the use of the patented machine is to protect the inventor in his discovery. So, here, the only method the owner of the Letters Patent had to protect the use of his invention was by saying to those desiring to use it and those desiring to purchase the product of its use, "you may not have it except upon such terms as I impose," which terms were reasonably designed to that end.

The suggestion that in this way the owner of the inventions extends his monopoly to unpatented articles is totally unsound. The enameled ware is unpatented and may be sold and dealt in freely if manufactured without the use of the invention covered by the Letters Patent in question. The public has no right to enameled ware, however, manufactured by the use of the Arrott invention.

Under the principle of the *Paper Bag Patent Case*, the owner of the Letters Patent here might have permitted the use of his invention for the purpose of manufacturing sanitary enameled iron ware upon condition that it should not be sold at all, and consequently that it might be sold upon prescribed conditions.

The defendant Wayman's right to make the agreements is amply established by the cases, that he brought about the making of them for his own benefit and to make money is clear from the evidence, that the defendants may have gone into them because they created conditions which they themselves desired in the enameled ware trade is immaterial, and the value of invention is incontestably proved.

It is submitted that the agreements are legal patent agreements and not subject to the Sherman Anti-Trust Act.

II.

THE COURT BELOW ERRED IN NOT DECREEING THAT THE AGREEMENTS ENTERED INTO BY THE DEFENDANTS, AND UPON WHICH THE PETITION IS BASED, WERE NOT IN RESTRAINT OF INTERSTATE TRADE AND COMMERCE AND NOT IN VIOLATION OF THE SHERMAN ANTI-TRUST ACT, AND THAT THE USE OF THE PATENTS WAS NOT A SUBTERFUGE.

The Sherman Act.

The acts alleged in the petition so far as the evidence in the case tends to establish them do not violate the provisions of the Sherman Act.

The agreements in the case at bar are not within the Sherman Act. The agreements were purely economic arrangements for the purpose of manufacturing and distributing economically and systematically in strict and normal compliance with modern trade progress sanitary enameled iron ware (*United States vs. Winslow*, 195 F., 578, 592).

They were open upon the same terms to all who chose to take advantage of them (v. IV., p. 173; *United States vs. Terminal R. R. Association*, 224 U. S., 383, 398, 410).

They were, moreover, based upon patents which created a true monopoly, a grant from the sovereign—the Constitution—so that to hold that this monopoly was violative of the Sherman Act would be judicial legislation and an attack upon the whole patent system (*Henry us. A. B. Dick Co.*, 224 U. S., 16, 27, 35).

Consequently, it has been held that the Sherman Act and the patent laws were passed under separate grants of constitutional power and do not affect each other (*Bement vs. National Harrow Co..*, 186 U. S., 70, 91; *Rubber Tire Wheel Co. vs. Milwaukee R. W. Co.*, 154 F., 358, 362).

To bring an agreement relating to a patent within the scope of the Sherman Act it must undertake to extend the monopoly to "unpatented territory;" that is, for instance, where a patentee has made the patented article according to the invention covered by the patent and disposes of said article unconditionally, to attempt then to impose restrictions upon the disposal of such article. That is not attempted in

this case, nor is it claimed that any such thing was attempted.

As said in one of the cases, to which reference is made herein, the Sherman Act relates only to contracts or combinations with reference to articles in which the people are entitled to freedom of trade or instrumentalities of commerce between which the people are entitled to free competition; and, according to the decided cases, a combination is legal between private persons, associations and corporations not owing a public duty or dealing in the necessaries of life, who are actually or potentially competitors, provided such combination is made to foster the business of those combining and the conditions upon which the combination is based are fairly and reasonably adapted to carry out the aforesaid purpose, and no effort is made to coerce or injure those not in the combination.

The true construction of the so-called anti-Trust Act and one that is not in conflict with any of the decisions is that it does not condemn a fair and reasonable attempt to avoid loss by means of trade agreements which are intended to prevent nothing but the cutting of rates below the reasonable expense of production and reasonable profit thereon; nor is the monopolization referred to in said anti-Trust Act simply the complete occupation of a certain field if that occupation may be fairly accomplished (*Fonotipia, Ltd., vs. Bradley*, 171 F., 951, 959).

The statement in *United States vs. Trans-Missouri Freight Ass'n*, 166 U. S., 290, that the Act applied whether the contract was reasonable or unreasonable, and which is largely responsible for the uncertainty which has prevailed as to the true construction of the Act was, as pointed out in *United States vs. Winslow*, 195 F., 578, 587, Reporter's law being contained in the head note.

History of the Act.

The Sherman anti-Trust Act was originally introduced on August 14, 1888, in the first session of the 50th Congress by Senator Sherman as S. 3445.

As then drawn, it was directed against all "arrangements, contracts, agreements, trusts or combinations between persons or corporations made with a view, or which tend, to prevent full and free competition

in the production, manufacture, or sale of articles of domestic growth or production, or of the sale of articles imported into the United States, and all arrangements, contracts, agreements, trusts or combinations between persons or corporations designed, or which tend, to advance the cost to the consumer of any such articles."

It was reintroduced December 4, 1889, in the first session of the 51st Congress in substantially the same form, and in this form was the subject of extensive debate, most of the leading Senators taking part and most, while in favor of the general purpose to prevent combinations in interstate trade harmful to the public, opposing the bill in its specific form.

The author himself on March 21, 1890 (21 Cong. Rec., p. 2456) declares of the bill:

> "It does not announce a new principle of law, but applies old and well-recognized principles of common law to the complicated jurisdiction of our State and Federal Government. Similar contracts in any State in the Union are now, by common or statute law, null and void. Each State can and does prevent and control combinations within the limit of the State."

And (p. 2457):

> "This bill does not seek to cripple combinations of capital and labor, the formation of partnerships or of corporations, but only to prevent and control combinations made with a view to prevent competition, or for the restraint of trade, or to increase the profits of the producer at the cost of the consumer. It is the unlawful combination, tested by the rules of common law and human experience, that is aimed at by this bill, and not the useful and lawful combination. * * * If their business is lawful they can combine in any way to enjoy the advantage of their united skill and capital, provided they do not combine to prevent competition."

And (p. 2460):

> "I admit that it is difficult to define in legal language the precise line between lawful and unlawful

combinations. This must be left to the courts to determine in each particular case. All that we, as lawmakers, can do is to declare general principles, and we can be assured that the courts will apply them so as to carry out the meaning of the law, as the courts of England and the United States have done for centuries."

And (p. 2562):

"The bill as reported contains three or four simple propositions which relate only to contracts, combinations, agreements made with a view and designed to carry out a certain purpose, which the laws of all the States and of every civilized community declare to be unlawful."

Senator Platt, of Connecticut, than whom there was no more conservative, wiser or experienced man then in the Senate, said of this bill (p. 2730):

"I do not like to vote against this bill. I believe that there are combinations in this country which are criminal, but I believe that every man in business * * * has a right * * * to obtain a fair profit upon his business and his work; and if he is driven by fierce competition to a spot where his business is unremunerative, I believe it is his right to combine for the purpose of raising prices until they shall be fair and remunerative. * * * I do not believe there is in this country among any class of people a real desire that anybody shall do business without receiving a fair profit, * * * and I do not believe that there is any class of people in this country who, when they face this false assumption that cheap prices are the great, beneficent thing for the country and think of it, will agree to that proposition. Whenever the price of anything is below what it costs to produce it, it ought to be raised, and any combination for the purpose of raising it to a point where the price is fair and reasonable ought not to be condemned; it ought to be encouraged. * * * there is no greater fallacy than that the cheaper prices are, the better it is

> for the community. It is not true. * * * The theory of this bill is that prices must never be advanced by any two or more persons, no matter how ruinously low they may be. That theory I denounce as utterly untenable, as immoral. * * *."

These observations were made of the bill in its original form; they apply with greater force to the bill as finally reported by the Committee, and passed.

Senator Hoar (p. 3152) said that the word "monopoly" as used in the bill meant:

> "* * * the sole engrossing to a man's self by means which prevent other men from engaging in fair competition with him."

And, when asked why if the common law denounced such a monopoly it was necessary to include it in the bill, said:

> "Because there is not any common law of the United States. * * * Now, we are dealing with an offense against interstate or international commerce, which the State cannot regulate by penal enactment, and we find the United States without any common law. The great thing that this bill does, except affording a remedy, is to extend the common law principles, which protected fair competition in trade in old times in England, to international and interstate commerce in the United States."

In *United Shoe Machinery Co. vs. Euclid L. La Chapelle*, published in the July 20, 1912, issue of the "Banker and Tradesman," a Boston paper, and not elsewhere reported, the court said the decision in the *Standard Oil Case*, as we understand it, holds that the test to determine whether or not a given contract or combination is in restraint of interstate trade and commerce is the standard of reason as applied to like contracts at common law.

"Statutes are not to be interpreted to change the common law except so far as a purpose so to do is necessarily implied" (*United States vs. Winslow*, 195 F., 578, 587, 588; *Northern Securities Case*, 193 U. S., 197, 361; Standard Oil Case, 221 U. S., 51, 59, 60).

While the expressions of opinion during debate upon a bill are not evidence by which the bill is to be construed, still the fact that a bill contains a provision with reference to competition and is then enacted leaving out all reference to competition and using phrases which had an ascertained meaning at the time of the enactment of the bill, does bear very materially upon the construction to be given to the act (*United States vs. E. L. Du Pont DeNemours & Co.*, 188 F., 127, 150).

Construction of the Act.

In *Standard Oil Co. of New Jersey vs. United States*, 221 U. S., 1, the Chief Justice said (p. 58), in an opinion which was only dissented from by Mr. Justice HARLAN, that the common law had come to treat as illegal

> "All contracts or acts which were unreasonably restrictive of competitive conditions either from the nature or character of the contract or act, or where the surrounding circumstances were such as to justify the conclusion that they had not been entered into or performed with the legitimate purpose of reasonably forwarding personal interest and developing trade, but on the contrary were of such a character as to give rise to the inferance or presumption that they had been entered into or done with the intent to do wrong to the general public and to limit the right of individuals, thus restraining the free flow of commerce and tending to bring about the evils, such as enhancement of prices which were considered to be against public policy;"

and that consequently (p. 59):

> "* * * the context manifests that the statute (the Sherman Act) was drawn in the light of the existing practical conception of the law of restraint of trade, because it groups as within that class, not only contracts which were in restraint of trade in the subjective sense, but all contracts or acts which theoretically were attempts to monopolize, yet which in practice had come to be considered as in restraint of trade in a broad sense."

But that (p. 59) :

> " In view of the many new forms of contracts and combinations which were being evolved from existing economic condition, it was deemed essential by an all-embracing enumeration to make sure that no form of contract or combination by which an undue restraint of interstate or foreign commerce was brought about could save such restraint from condemnation ;"

and that the words " to monopolize " and " monopolize " meant the monopoly defined by Senator Hoar, that is, " The sole engrossing to a man's self by means which prevent other men from engaging in fair competition with him ;" or, in other words, " monopoly and the acts which produce the same result as monopoly, that is, an undue restraint of the course of trade," which, in the course of the evolution before referred to in the opinion, " all came to be spoken of as and to be synonymous with restraint of trade."

And he concluded (p. 60) :

> " It follows that it was intended that the standard of reason which had been applied at the common law and in this country in dealing with subjects of the character embraced by the statute was intended to be the measure used for the purpose of determining whether in a given case a particular act had or had not brought about the wrong against which the statute provided."

The Sherman Act has no application, because the agreements were an economic arrangement to meet the demands of the market.

The Sherman Act applies only to such things as unreasonably restrain trade to the injury of the public, but does not apply to such things as are entered into for the purpose of reasonably forwarding the personal interests of the parties and developing their trade, though there may be an incidental restraint of trade.

The agreements in the case at bar are not within the Sherman Act, because their dominant purpose was to promote the trade of the parties, and there are in the agreements and in

the acts under them none of the elements pointed out in the Standard Oil case and the Tobacco case as objectionable, as

(*a*) Enhancement of prices.
(*b*) Limitation of output.
(*c*) Deterioration of quality.
(*d*) Intimidation, coercion, or fraud.

On the contrary, in the agreements in the case at bar and the acts under them, the prices were not enhanced, there was no limitation of output, there was a great improvement in quality, and there was no intimidation, coercion or fraud.

As stated by the Chief Justice in the *Standard Oil Case* (p. 78): "One of the fundamental purposes of the Statute, is to protect, not to destroy, rights of property."

And he says further (p. 78): "Injury to the public by the prevention of an undue restraint on, or the monopolization of, trade or commerce is the foundation upon which the prohibitions of the Statute rest."

Every case must be determined upon its own facts and it can safely be "left to the judiciary to decide whether in a given case particular acts come within a generic statutory provision" (p. 69), such as Sections 1 and 2 of the Sherman Act.

In the opinion it is stated (p. 63) that:

> "Judgment must in every case be called into play in order to determine whether a particular act is embraced within the statutory classes, and whether, if the act is within such classes, its nature or effect causes it to be a restraint of trade within the intendment of the Act."

The Court says in the same case (p. 52):

> "The evils which led to the public outcry against monopolies and to the final denial of the power to make them may be thus summarily stated: 1. The power which the monopoly gave to the one who enjoyed it to fix the price and thereby injure the public; 2. The power which it engendered of enabling a limitation on pro-

duction; and, 3. The danger of deterioration in quality of the monopolized article which it was deemed was the inevitable resultant of the monopolistic control over its production and sale."

And (p. 55):

"at common law the evils consequent upon engrossing, etc., caused those things to be treated as coming within monopoly and sometimes to be called monopoly and the same considerations caused monopoly because of its operation and effect, to be brought within and spoken of generally as impeding the due course of or being in restraint of trade."

The Court then said (p. 58):

"that the dread of enhancement of prices and of other wrongs which it was thought would flow from the undue limitation on competitive conditions caused by contracts or other acts of individuals or corporations, led, as a matter of public policy, to the prohibition or treating as illegal all contracts or acts which were *unreasonably* restrictive of competitive conditions, either from the nature or character of the contract or act or where the surrounding circumstances were such as to justify the conclusion that they had not been entered into or performed with the legitimate purpose of reasonably forwarding personal interest and *developing* trade, but on the contrary were of such a character as to give rise to the inference or presumption that they had been entered into or done with the intent to do wrong to the general public and to limit the right of individuals, thus restraining the free flow of commerce and tending to bring about the evils, such as *enhancement* of prices, which were considered to be against public policy." (Italics ours.)

Restraint is often mere regulation, or temporary obstruction, for the purpose of clearing out the channel and letting the stream flow at full tide (*United States vs. Winslow*, 195 Fed., 578, 586).

Construing the Sherman Act in *U. S. vs. E. I. DuPont DeNemours & Co.*, 188 F., 127, the Court said (pp. 150, 151):

"A number of bills were introduced in the Fiftieth Congress (in August and September, 1888) designed to make unlawful every combination 'to prevent competition' and 'to prevent full and free competition' in the sales of articles transported from one state to another. None of them was enacted into law. On December 4, 1889, Mr. Sherman introduced into the Senate of the Fifty-first Congress a bill which declared unlawful every combination 'to prevent full and free competition' in such sales. After much debate the bill was, on March 27, 1890, referred to the committee on judiciary, and on April 2, 1890, that committee reported it back to the Senate with an amendment, drawn by the late Senator Hoar, striking out all after its enacting clause and substituting therefor the act as we now have it. As enacted, it does not condemn every combination 'to prevent competition.' What it condemns is every combination in restraint of trade or commerce among the several states, etc. When the bill went from the Senate to the House, the latter body amended it by inserting a provision extending the scope of the act to all agreements entered into for the purpose of 'preventing competition' either in the purchase or sale of commodities; but the amendment was disagreed to. While there is a 'general acquiescence in the doctrine that debates in Congress are not appropriate sources of information from which to discover the meaning of the language of a statute passed by that body' (*United States v. Freight Association*, 166 U. S., 318 * * *), that rule 'in the nature of things is not violated by resorting to debates as a means of ascertaining the environment at the time of the enactment of a particular law; that is, the history of the period when it was adopted' (*Standard Oil Co. v. United States*, 221 U. S., 50 * * *).

"There is a distinction between restraint of competition and restraint of trade. The latter expression had, when the anti-trust act was passed, a definite legal

signification. Not every combination in restraint of competition was, in a legal sense, in restraint of trade. Two men in the same town engaged in the same business as competitors may unite in a copartnership, and thereafter, as between themselves, substitute co-operation for competition. Their combination restrains competition, and if their town is located near the line between two states, and each has been trading in both states, their combination restrains competition in interstate trade. But it does not necessarily follow that such restraint of competition is a restraint of interstate trade and commerce. The determination of whether it be so must depend upon the facts and circumstances of each individual case. It is undoubtedly the policy of the statute that competitive conditions in interstate trade should be maintained wherever their abolition would tend to suppress or diminish such trade. But this being true does not read into the statute a denunciation of all agreements that may restrain competition without regard to their purpose or direct effect to restrain 'trade or commerce among the several states.' To what extent the anti-trust act condemns combinations that restrain full and free competition in interstate trade is a question that has been much debated. For a dozen years, at least, it has been settled that it does not condemn combinations which only indirectly, remotely, or incidentally restrain interstate trade.

"The recent decisions of the Supreme Court in *Standard Oil Co. vs. United States*, and *American Tobacco Co. vs. United States*, 221 U. S., 106, * * * make it quite clear that the language of the anti-trust act is not to receive that literal construction which will impair rather than enhance freedom of interstate commerce. As we read those decisions, restraint of interstate trade and restraint of competition in interstate trade are not interchangeable expressions. There may be, under the anti-trust act, restraint of competition that does not amount to restraint of interstate trade, just as before the passage of the act there might have been restraint of competition that did not amount to a common-law

restraint of trade. This fact was plainly recognized in *United States vs. Joint Traffic Association*, 171 U. S., 505, 567, * * * where Mr. Justice PECKHAM said:

> "We might say that the formation of corporations for business or manufacturing purposes has never, to our knowledge, been regarded in the nature of a contract in restraint of trade or commerce. The same may be said of the contract of partnership. It might also be difficult to show that the appointment by two or more producers of the same person to sell their goods on commission was a matter in any degree in restraint of trade. We are not aware that it has ever been claimed that a lease or purchase by a farmer, a manufacturer, or merchant of an additional farm, manufactory, or shop, or the withdrawal from business of any farmer, merchant, or manufacturer, restrained commerce or trade within the legal definition of that term."
>
> "While all this is true, the recent decisions of the Supreme Court make it equally clear that a combination cannot escape the condemnation of the anti-trust act merely by the form it assumes or by the dress it wears. It matters not whether the combination be 'in the form of a trust or otherwise,' whether it be in the form of a trade association or a corporation, if it arbitrarily uses its power to force weaker competitors out of business, or to coerce them into a sale to or union with the combination, it puts a restraint upon interstate commerce, and monopolizes or attempts to monopolize a part of that commerce, in a sense that violates the anti-trust act."

In *United States vs. John Reardon & Sons Co.*, 191 Fed., 454, indictments were brought against certain persons for violation of the provisions of the Sherman Anti-Trust Act, and upon demurrer to the indictments the Court (PUTNAM, C. J.), said (p. 458):

> "* * * Regulation of trade is not restraint of trade. On the other hand, regulation of trade may be

the very thing which secures freedom of trade. There are plenty of illustrations. Take, for instance, the great lines running Atlantic steamers into Boston. While they are running their steamers in here, they find there is a lack of outward freight while there is a surplus of outward freight at New York, and they combine among themselves to regulate the sailing of their steamers, so as to give more steamers at New York and fewer at Boston. That is a regulation. Did anybody ever suppose that that was restraint of trade in any proper sense of the word. In my own state the most singular illustration is to be found where there was a congeries of small railroads, and all of them consolidated by state action into a single great trunk line, an act which, as many people have construed the Sherman act, would be absolutely illegal. It is admitted beyond all question that that single line does the work of the state to the entire satisfaction of the state in a way that those smaller lines could not possibly do it.

"Therefore something more than mere regulation is necessary, particularly as the indictment does not show whether or not by regulation they cut down prices or enhanced them, or had any power to divide up the territory so as to obtain a monopoly of any part thereof. All the cases where there has been a regulating found by the Supreme Court to be illegal, or a division of territory, there has been a practical monopoly in certain directions resulting therefrom, or the common case where parties agreed under a penalty to divide up, generally condemned by the Supreme Court, and by all the courts."

In *United States vs. Terminal R. R. Assn. of St. Louis*, 224 U. S., 383, the Terminal Company had acquired control of substantially all the means of entrance into St. Louis by railroads from either the East or the West.

The Court held that if the Terminal Company had admitted any railroad wishing to enter St. Louis upon equal terms with any other, it would have been an unobjectionable combination; but since it required the unanimous consent of its members, any one of them having the veto power, to the

admission of a railroad company, it, on account of the topography of the country about St. Louis, operated to restrain interstate commerce, saying (pp. 394, 395):

> "We come, then, to the question upon which the case must turn: Has the unification of substantially every terminal facility by which the traffic of St. Louis is served resulted in a combination which is in restraint of trade within the meaning and purpose of the Anti-Trust Act?
>
> "It is not contended that the unification of the terminal facilities of a great city where many railroad systems center is, under all circumstances and conditions, a combination in restraint of trade or commerce. Whether it is a facility in aid of interstate commerce or an unreasonable restraint forbidden by the act of Congress, as construed and applied by this court in the cases of *The Standard Oil Company v. The United States*, 221 U. S., 1, and *The United States v. American Tobacco Company*, 221 U. S., 106, will depend upon the intent to be inferred from the extent of the control thereby secured over instrumentalities which such commerce is under compulsion to use, the method by which such control has been brought about and the manner in which that control has been exerted * * * (p. 410). Plainly the combination which has occurred would not be an illegal restraint under the terms of the statute if it were what is claimed for it, a proper terminal association acting as the impartial agent of every line which is under compulsion to use its instrumentalities."

In the case at bar the testimony is that all manufacturers were offered and any could secure a similar license agreement, and Mr. Wayman testified that he did not refuse any one similar privileges upon equal terms (v. IV., p. 173); and it was to Mr. Wayman's pecuniary and selfish interest to grant licenses to as many as possible.

Mogul S. S. Co. vs. McGregor, decided July 13, 1889 by the Queen's Bench Division (23 Q. B. D., 598), and affirmed

by the House of Lords, December 18, 1891, A. C. (1892) 25, is cited in the Standard Oil case as clearly showing "the scope and effect of this freedom to trade and contract."

In that case an association of ship owners entered into an agreement in order to secure the trade exclusively for themselves at profitable rates, to regulate the number of ships to be sent by the association to the loading ports, the division of cargoes, and the freights to be demanded, that a rebate of 5% on the freights should be allowed to all shippers who shipped only with members of the association, that agents of members should be prohibited, on pain of dismissal, from acting in the interest of competing ship-owners, that shippers who shipped by ships owned by persons not members of the association should forfeit their total rebates, and that in case persons not members of the association send ships to the loading port the association would send sufficient ships to underbid such outsiders and reduce the freights below a remunerative rate, which latter course was actually adopted with regard to the appellants.

In affirming the decision of the Court below the House of Lords (Lord WATSON) said (p. 42):

> "There is nothing in the evidence to suggest that the parties to the agreement had any other object in view than that of defending their carrying-trade during the tea season against the encroachments of the appellants and other competitors, and of attracting to themselves custom which might otherwise have been carried off by these competitors. That is an object which is strenuously pursued by merchants great and small in every branch of commerce; and it is, in the eyes of the law, perfectly legitimate. If the respondents' combination had been formed, not with a single view to the extension of their business and the increase of its profits, but with the main or ulterior design of effecting an unlawful object, a very different question would have arisen for the consideration of your Lordships. But no such case is presented by the facts disclosed in this appeal."

And Lord HALSBURY, L. C., said (p. 37):

> "I entirely adopt and make my own what was said by Lord Justice BOWEN in the Court below:
>
> "'All commercial men with capital are acquainted with the ordinary expedient of sowing one year a crop of apparently unfruitful prices, in order by driving competition away to reap a fuller harvest of profit in the future; and until the present argument at the Bar it may be doubted whether shipowners or merchants were ever deemed to be bound by law to conform to some imaginary 'normal' standard of freights or prices, or that law courts had a right to say to them in respect of their competitive tariffs, 'Thus far shalt thou go, and no further.'"

The statement in one of the cases (*United States vs. Freight Association*, 166 U. S., 290, 327), that the Sherman Act does more than apply the common law to the United States Courts, is explained by the Chief Justice in the reference to "the many new forms of contracts and combinations which were being evolved from existing economic conditions"; and he recognizes in the statement "it is undoubted that in the opinion in the case general language was made use of which when separated from its context would justify the conclusion that it was decided that reason could not be resorted to for the purpose of determining whether the acts complained of were within the statute," that in every case the decision is limited by the facts upon which the Court is called to pass.

In *Hopkins vs. United States*, 171 U. S., 578, decided intermediate the decisions of the *Freight Association Case* (166 U. S., 290) and the *Joint Traffic Case* (171 U. S., 505), Mr. Justice PECKHAM, who wrote the opinions in all three cases, said (p. 592):

> "To treat as condemned by the act all agreements under which, as a result, the cost of conducting an interstate commercial business may be increased would enlarge the application of the act far beyond the fair meaning of the language used. There must be some

direct and immediate effect upon interstate commerce in order to come within the act."

And in the *Joint Traffic Case, supra,* the Court said (p. 567) :

> " We might say that the formation of corporations for business or manufacturing purposes has never, to our knowledge, been regarded in the nature of a contract in restraint of trade or commerce. The same may be said of the contract of partnership. It might also be difficult to show that the appointment by two or more producers of the same person to sell their goods on commission was a matter in any degree in restraint of trade.
>
> " We are not aware that it has ever been claimed that a lease or purchase by a farmer, manufacturer or merchant of an additional farm, manufactory or shop, or the withdrawal from business of any farmer, merchant or manufacturer, restrained commerce or trade within any legal definition of that term ; and the sale of a good will of a business with an accompanying agreement not to engage in a similar business was instanced in the *Trans-Missouri case* as a contract not within the meaning of the act ; and it was said that such a contract was collateral to the main contract of sale, and was entered into for the purpose of enhancing the price at which the vendor sells his business."

Following the same line and anticipating the decision of the *Standard Oil Case,* Judge CHATFIELD, in *Fonotipia Limited vs. Bradley,* 171 F., 951, said (p. 959) :

> " If the patents be disregarded, and the matter be considered as a purely business arrangement, it is impossible to see where any offense against the statute mentioned has been shown. Restriction of competition may not *(sic)* include a fair and reasonable attempt to avoid loss by trade agreements which are aimed to prevent nothing but the cutting of rates below the reasonable

> expense of production and reasonable profit thereon; nor is a 'monopoly' in the sense meant by the statute, merely the complete occupation of a certain field where that occupation does not unfairly exclude other competitors. * * * A certain intent and certain motives, which need not be discussed at length, must be present to establish the interference with competition and the existence of the monopoly at which the statute above mentioned was aimed and which is included within its provisions. A mere attempt to obtain a fair profit, even by an agreement not to under sell, must be tested by the measure of what would be a fair price under competition, and it must be determined whether the centralization or control of the output is intended to or does accomplish any interference with the free action of independent parties who might compete, or with the securing to the public of all the benefits to which they are entitled over and above the reasonable cost of production and reasonable profit."

In *United States vs. American Tobacco Co.*, 221 U. S., 106, the Supreme Court found that the defendants had pursued a consistent course of acquiring concerns connected with the tobacco industry, taking from those connected with the concerns acquired covenants not to compete with the American Tobacco Company and its allied companies, and in many cases immediately closing the plants, and that the evident purpose of the course adopted was to secure control by unfair means of the tobacco industry, and that consequently the defendants were guilty of a violation of the Sherman Anti-Trust Act. The Court reaffirms the decision in the *Standard Oil Case*, and says that it was held in that case (p. 179)

> "* * * that as the words "restraint of trade" at common law and in the law of this country at the time of the adoption of the Anti-trust Act only embraced acts or contracts or agreements or combinations which operated to the prejudice of the public interests by unduly restricting competition or unduly obstructing the due course of trade or which, either because of

> their inherent nature or effect or because of the evident purpose of the acts, etc., injuriously restrained trade, that the words as used in the statute were designed to have and did have but a like significance. It was therefore pointed out that the statute did not forbid or restrain the power to make normal and usual contracts to further trade by resorting to all normal methods, whether by agreement or otherwise, to accomplish such purpose;"

and after saying that the statute was to be construed broadly so as to effect its purpose and bring within its terms everything within the spirit of the act, and not only what was within the letter, the opinion says (p. 181):

> "The history of the combination '(the defendants)' is so replete with the doing of acts which it was the obvious purpose of the statute to forbid, so demonstrative of the existence from the beginning of a purpose to acquire dominion and control of the tobacco trade, not by the mere exertion of the ordinary right to contract and to trade, but by methods devised in order to monopolize the trade by driving competitors out of business which were ruthlessly carried out upon the assumption that to work upon the fears or play upon the cupidity of competitors would make success possible. We say these conclusions are inevitable, not because of the vast amount of property aggregated by the combination, not because alone of the many corporations which the proof shows were united by resort to one device or another. Again, not alone because of the dominion and control over the tobacco trade which actually exists, but because we think the conclusion of wrongful purpose and illegal combination is overwhelmingly established."

None of these things appears in the case at bar.

As stated in both the *Standard Oil Case* and the *Tobacco Case*, those decisions are "in accord with all the previous decisions of the Court," as will appear from a careful examina-

tion of the other decisions in connection with the facts of each case which were before the Court.

In *United States vs. E. C. Knight Co.*, 156 U. S., 1, the purchase of the stock of four Philadelphia refineries with shares of its own stock by the American Sugar Refining Company was held not to be within the act, because the transaction related exclusively to the acquisition of the Philadelphia refineries and the business of sugar refining in Philadelphia, and bore no direct relation to interstate or foreign commerce.

In *Bigelow vs. Calumet & Hecla Mining Co.*, 167 F., 721, the procuring of control by the Calumet & Hecla Mining Company of a competing mining company was held not to be within the act, the Court saying (p. 729):

> "I am convinced from a careful consideration of the testimony, that the controlling motive and purpose of the Calumet & Hecla Company in acquiring its interest in the mining properties mentioned was to extend its industrial life, and keep up and increase, if possible, its production and net earnings, and that the evidence fairly negatives a design thereby to reduce the output of any of the companies or artificially to increase or maintain the price of the product, or to stifle competition between the related companies, or to prejudice other stockholders generally of either company associated, or to interfere with the integrity of either company."

In *Camors-McConnell Co. vs. McConnell*, 140 F., 412, aff'd. *id.*, 987, an agreement by which the defendant agreed not to engage in a competing business in consideration of the formation of the corporation and the taking over by it of all the property, including the good will of the defendant's partnership, was held not to be within the act.

In *Whitwell vs. Continental Tobacco Co.*, 125 F., 454, the refusal of defendants to sell plaintiff tobacco products at prices which would enable him to resell them at a profit, unless he refrained from buying, selling or handling Club Chewing Tobacco made by independent manufacturers, was held not to be within the act.

In *Prame vs. Ferrell*, 166 F., 702, the plaintiff and defendant had been engaged as partners in the selling of machines, and had built up a business extending practically throughout the United States. Prame sold out to Ferrell, and agreed not to engage in the manufacture or sale of similar machines. Such covenant was held not to be within the act, the Court quoting from *Gibbs vs. Consolidated Gas Co.*, 130 U. S., 396, as follows (p. 705):

> "Public welfare is first considered, and if it be not involved and the restraint upon one party is not greater than the protection to the other party requires, the contract may be sustained."

In *Hopkins vs. United States*, 171 U. S., 578, an unincorporated association of commission merchants for conducting the sale of cattle at the Kansas City stock-yards was held not to be within the act, because its rules, and the restrictions imposed thereby, were held to be reasonably adapted to protect and enhance the business of its members.

In *Anderson vs. United States*, 171 U. S., 604, a like decision to that in the *Hopkins Case* was reached, the defendants in the Anderson case differing from those in the Hopkins case in that they were purchasers of cattle, while the defendants in the Hopkins case were only commission merchants.

In *Cincinnati Packet Co. vs. Bay*, 200 U. S., 179, the Court held not within the act a contract by which one company sold its steamers and other boats to another, agreeing not to engage for five years in competing with the purchaser in the freight and passenger business from Portsmouth, Ohio, to Cincinnati, Ohio. The Court said (p. 184):

> "We will suppose then that the contract does not leave commerce among the States untouched. But even on this supposition it is manifest that interference with such commerce is insignificant and incidental, and not the dominant purpose of the contract, if it actually was thought of at all. * * * This being our view of the covenant in question, whatever differences of opinion there may have been with regard to the scope of the act of July 2, 1890, there has been no intimation from

any one, we believe, that such a contract, made as part of the sale of a business and not as a device to control commerce, would fall within the act."

In *Phillips vs. Iola Portland Cement Works*, 125 F., 593, *certiorari* to review which was denied (192 U. S., 606), a contract by a manufacturer of cement in Kansas with some dealers in Texas for the sale of a large quantity of cement, on condition that it should not be sold by the purchaser outside of the State of Texas, was held not to violate the Sherman Anti-Trust Act on the ground that the dominant purpose was the promotion and protection of the seller's business, and any restraint of trade resulting only incidental and such as was reasonably necessary to protect the seller's rights.

In *Northern Securities Co. vs. United States*, 193 U. S., 197, a holding company with a capital of $30,000, which took over about $400,000,000 of stock of two competing railroads, was held to be within the act. Here the two railroads owed a public duty and each constituted what is aptly called a natural monopoly, and hence, as is well said in the *Tobacco Case*, their combination could not be made legal " by resorting to any disguise or subterfuge of form, since resort to reason rendered it impossible " to doubt its purpose was to violate the spirit, if not the letter of the statute.

In *United States vs. Trans-Missouri Freight Assn.*, 166 U. S., 290, and *United States vs. Joint Traffic Assn.*, 171 U. S., 505, agreements between competing railways, regulating rates and containing other provisions which restricted free competition between them, thus restraining the trade of shippers, were held to be within the act.

It should be noted, however, that intermediate the decision of these two cases the *Hopkins Case* was decided.

In *Addyston Pipe & Steel Co. vs. United States*, 175 U. S., 211, an agreement between certain manufacturers of iron pipe, the purpose of which was directly to increase the price and to restrict competition in certain specified territory, was held to be within the act.

In *Montague vs. Lowry*, 193 U. S., 38, the Court held within the act an agreement between manufacturers and dealers in tiles, etc., who agreed not to purchase from manufacturers not

members of the association and not to sell unset tiles to any one not a member of the association for less than 50 per cent. more than was charged members of the association, and that the manufacturers would not sell one not a member of the association, the penalty of violation of the agreement being forfeiture of membership.

In *Swift & Co. vs. United States*, 196 U. S., 375, the Court held within the act a combination of a dominant proportion of the dealers in fresh meat throughout the United States not to bid against each other in the live stock market, to bid up prices temporarily in order to induce the cattlemen to send their stock to the stockyards, to fix prices at which they will sell, and to restrict shipments of meat when necessary, to establish a uniform rule of credit to dealers, to keep a black list, to make uniform and improper charges for cartage, and finally to secure rebates from the railroads.

In *Loewe vs. Lawlor*, 208 U. S., 274, the Court held within the act a combination of labor organizations and the members thereof, to compel a manufacturer, whose goods were almost entirely sold in other States, to unionize his shop, and on his refusal to do so, to boycott his goods and prevent their sale in States other than his own until such time as the resulting damage forced him to comply with their demands. This decision was on demurrer and assumed the facts alleged to exist. The fact that subsequently, when heard upon the merits, the case was decided against the plaintiffs, does not affect the decision of the Supreme Court.

In *Shawnee Compress Co. vs. Anderson*, 209 U. S., 423, 433, the Court held void, whether considered under the common law, the Sherman Act, or statutes of Oklahoma, as placing upon the lessor a greater restraint than the protection of the lessee required, a lease of a compress to a combination, which it was found was securing compresses in such situations in various States as to control the business of compressing cotton, the lessor going out of the field of competition, covenanting not to enter that field again and pledging itself to render every assistance to prevent others from entering it.

In the *Tobacco Case* the Chief Justice stated (p. 182) six tests, from which he said (p. 183):

> "there comes inevitably to the mind the conviction that it was the danger which it was deemed would arise to

individual liberty and the public well-being from acts like those which this record exhibits, which led the legislative mind to conceive and to enact the Anti-trust Act, considerations which also serve to so clearly demonstrate that the combination here assailed is within the law as to leave no doubt that it is our plain duty to apply its prohibitions."

In the Standard Oil case, the Court said the Sherman Act did not include (p. 66) " all agreements under which as a result the cost of conducting an interstate commercial business may be increased," citing *Hopkins vs. United States*, 171 U. S., 578.

In the case at bar none of the features which are condemned by the Supreme Court in the *Standard Oil* and *Tobacco cases*, or in the decisions by the Supreme Court in other cases under the Sherman Anti-Trust Law, are present. On the contrary, in the case at bar the agreements complained of, and the acts of the parties thereunder, come clearly within the class of contracts which are not within the Act, and the inclusion of which within the Act the Chief Justice in the *Standard Oil* case said (p. 66) " would enlarge the application of the Act far beyond the fair meaning of the language used."

The prices of Sanitary Enameled Iron Ware were not *enhanced* to the *injury* of the *public*. The difference in the quality of the ware furnished the public would have justified a very material increase in price.

The cases cited show that prices may be fixed for the purpose, and with the result stated by Mr. Clow to have followed in this case (v. IV., p. 35), that is, that the manufacturer may direct his efforts to making the best possible article under a fixed cost and the competition between the manufacturers be in the quality of the articles produced; and, as stated by Mr. Sisk (v. IV., p. 86), that " seconds were eliminated from the market entirely, and the result was that we were selling a better class of goods, and while there would of necessity be a slight advance in price, that advance was made up for by the quality of the goods, so that I think the trade generally was benefited. They were getting better goods for their money;" but Mr. Sisk testified (p. 87) that the price to the plumber was, if anything, a little lower; and Mr. Sullwold said, " The proposed resale price is

considerably less than we are now getting" (Petitioner's Exhibit No. 165, v. II., p. 280, f. 2).

Moreover, there is no evidence in the case that the prices were actually increased either by Mr. Wayman or by the manufacturers. Mr. Wayman testified (v. IV., p. 196):

> "I took the printed prices of the various manufacturers that were in effect at that time and grouped the materials and articles into different classes in the shape of schedules, and to the printed prices I added certain percentages so that with the discounts and maximum rebate allowed the prices equaled approximately 5% below the then printed prices."

Enameled ware is sold under published price lists of the various manufacturers, with published discounts, and what Mr. Wayman means by the above testimony is that taking such published lists (which were all substantially alike) and first taking off the published discount he then took off a further discount of five per cent., so that the result necessarily could not have increased the prices.

In other words, there was a slight decrease, and no increase, of prices (v. II., p. 280; v. IV., p. 87).

The fact is there was no price fixed to the consumer (v. IV., p. 186). The manufacturers competed by reason of their differentials (v. IV., p. 187) and those between whom there were no differentials, as well as those between whom there were differentials, still further competed by including plumbing supplies in connection with the sanitary enameled iron ware, upon which plumbing supplies there was no price named and the manufacturers could fix their own prices.

The prices fixed were to the plumber, and the licensed jobbers competed among themselves by being able to sell their enameled ware in connection with other plumbing supplies which went with the enameled ware, which in a great many territories were, in fact, sold at cost or below cost. Any jobber in any part of the country could compete with any jobber in any other part of the country and offer different prices.

No control was attempted to be exercised over anything except the immediate product of the use of the patents (enam-

eled ware), and no attempt was made to control anything used in connection with the enameled ware.

The supply pipes, bath cocks, waste pipes, and all other plumbing fixtures, were sold at whatever price the manufacturer or the jobber saw fit to sell them. There was no attempt to control the price to the ultimate consumer, and the prices charged to the ultimate consumer varied (v. IV., p. 188).

Mr. Kroos, Secretary of J. M. Kohler Sons Company, to whose testimony counsel for the Government below referred in support of his claim that the prices were increased, and who testified that the increase over the amount which his firm was then receiving which his firm would have received had it adopted the Price List, ranged, according to a table which he had prepared, from 1¼% to 45% on the entire line (v. I., p. 464), was entirely discredited on cross-examination.

The witness admitted that he knew nothing about either the cost to or the price of the licensed manufacturers; that his table was prepared from his understanding of the Price List; that he did not know how the Price List was prepared, or on what theory it was prepared; that his table was not prepared with any intention of showing the cost of articles of Sanitary Enameled Iron Ware to the jobber or plumber according to the Price List, but represented merely his calculations to show what Kohler & Co. would have received for articles manufactured by them if the price of such articles were calculated upon the same basis as certain articles in the Price List manufactured by certain of the licensed manufacturers. It was clearly shown that Mr. Kroos either did not, or would not, understand how the Price List was formed and that in the order of his calculations he was in error.

The Court is earnestly asked, if it deems the question of increase of price to be important, and therefore considers it necessary to consider Mr. Kroos' testimony, to carefully read his testimony (v. I., pp. 464–489) and especially the following (p. 489):

> "Mr. Grosvenor: * * * The Exhibit does not state prices for any of the Standard goods or any of the licensed manufacturers, either on June 1st, 1910, or at any time subsequent thereto or prior thereto.

"MR. NOBLE: Does counsel for Government mean by the language used when he says 'price received by the Kohler Company' the amount which was received by the Kohler Company?

"MR. GROSVENOR: I mean the actual amounts received by the Kohler Company for the articles enumerated according to the sales system in effect and enforced by the Kohler Company, that system being enforced by the Kohler Company on June 1st and today, the Exhibit also showing the amounts which the Kohler Company would have received for those same articles if they had entered into the licensing agreement, and had calculated their prices according to the Resale Plan as the witness understands those prices to be applied."

After the cross-examination the Government abandoned the table prepared by Mr. Kroos and it is not printed in the record.

In the case at bar there was absolutely no limitation on production, but on the contrary the interest of all parties was to extend the sale of Sanitary Enameled Iron Ware manufactured by the use of the Arrott patent. Wayman's interest to do so was in order that he might receive greater royalty, and the corporation defendants' in order that they might make a larger profit.

There was no deterioration in the quality of the articles. The reason why there formerly was danger of deterioration in the quality of a monopolized article was that similar articles were not procurable elsewhere, and consequently the monopolist could get his price without regard to the quality of the article, and his interest led him to reduce the quality in order to make a larger profit. That is true in this case since the articles could be procured of those who did not take licenses.

The interest of the manufacturers who were the original producers of the ware was to improve the ware in quality—a benefit and not an injury to the public—and their object in entering into the agreements in this case was primarily for this purpose (v. IV., pp. 134–138), and this would continue to be to the interest of the manufacturers, lest vitreous china, porcelain

ware and other forms of competitive articles should again come into successful competition with their output.

The question presented in any case of an alleged violation of the Sherman Act under the decisions of the Supreme Court is a question of fact; and the facts established by the evidence in a particular case determine the quality of the acts according to their ultimate effect upon the public.

As said in the *Standard Oil Case*, "The development of more accurate economic conceptions and the changes in conditions of society" cause it "to be recognized" that acts formerly deemed to have a "harmful tendency" which induced legislation prohibiting or regulating them, do not now have such harmful tendency, if they ever did have such tendency; and in many cases are now deemed to have a beneficial, rather than a harmful tendency.

Thus it is realized that since it is no longer possible for the sovereign to grant a personal monopoly which not only gave the control of the article to the monopolist, but prohibited any others from manufacturing or dealing in articles of like kind, "freedom to contract was the essence of freedom from undue restraint or the right to contract."

In other words, that the success of an attempt to monopolize in the sense of securing a large part, or the whole, of any particular trade, was best prevented by the fact that as soon as it appeared profitable others would be induced to enter that field and by competition restrain the attempt within reasonable limits.

It follows that neither the mere fixing of price, nor restriction of competition, nor any other of the "catch phrases" so commonly used to create prejudice against so-called combinations, of themselves, or without consideration of the circumstances under which they are adopted, the purposes they are intended to serve, and the object sought to be attained, is contrary to the spirit of the Sherman Act.

They all, singly or together, may not operate in a given case to injure the public by an undue restraint on, or the monopolization of trade but on the contrary may operate in furtherance of the "fundamental purposes of the Statute" which the Chief Justice declared in the *Standard Oil Case* to be (p. 78) "to protect, not to destroy, rights of property." See, also, Terminal Case, *supra*.

As said in *Darius Cole Transp. Co. vs. White Star Line,* 186 F., 63, 66, it is "the dominant purpose" of the parties which determines the character of the agreements (pp. 68, 69):

> "If they are not unlawful and their due performance is not unduly prejudicial to the public they cannot be impeached by suspicion, or even proof, that the parties intended something wrong, so long as that proof does not go to any act or fact extraneous to the contract."

The dominant purpose of the Licensees in the case at bar was to forward their personal interests, and to protect and develop their trade by improving the quality of Sanitary Enameled Iron Ware, to the accomplishment of which the use of the Arrott invention by the various manufacturers was a necessary prerequisite, and incidental to which it was required that the manufacturers should be enabled to rely upon receiving a price which would enable them to use the Arrott invention advantageously so as to produce the best results, and that the licensees and their customers put on the market only licensed ware.

The dominant purpose of the licensor Mr. Wayman, was to secure as many licensees as possible; to promote and extend the sale of the product of the use of the invention; to enable the licensees to conduct their business successfully, following good manufacturing practice and producing the best results by the use of the Arrott invention; to insure the performance of the license agreements, for which purpose the conditions in the license agreements were imposed; and, in order to enable the licensees to carry out the covenants contained in the license agreements, to pay him his royalties and secure to themselves a reasonable profit to establish the price of the product of the use of the invention.

At the time the agreements in this case were entered into the trade in Sanitary Enameled Iron Ware was very much demoralized (v. IV., pp. 142, 143); the market was flooded with "seconds" (v. IV., p. 135). "Seconds" are articles which for any cause are defective (v. IV., pp. 40, 57, 135, 137, 142); but the defects were not discernible by the ordinary purchaser (v. IV., p. 135).

The manufacturers sold them as "seconds," but they were often bought by the plumber from the jobber when the specifications called for a first-class article, and the jobber was unable, even if he had knowledge of the facts, to prevent the plumber from doing so (v. IV., pp. 45, 66, 135).

Nevertheless the jobber was blamed and, upon discovery of the defects, the jobber had to replace the article or make an allowance, in either case at a cost exceeding his profit (v. IV., pp. 42, 82, 86, 92).

The result was that Sanitary Enameled Iron Ware was made unpopular both with the jobber and with the consumer (v. IV., p. 143). In fact, many of the jobbers considered the discontinuance of the handling of Sanitary Enameled Ware altogether (v. A, pp. 50, 62, 75, 97; v. II., p. 97; v. IV., pp. 39, 42, 58, 143). The consequence was that the sale in competition with Sanitary Enameled Iron Ware of porcelain and vitreous china was increasing, with the possibility of Sanitary Enameled Iron Ware being driven from the market entirely (v. I., p. 67; v. IV., pp., 134, 138, 142, 143, 185).

Then, the sale of "seconds" resulted in the cutting of prices, so that those manufacturers who made a good article were at a very great disadvantage (v. IV., pp. 68, 69).

The result of these conditions was that many sought to buy Sanitary Enameled Iron Ware wherever they could get it cheapest, without regard to quality (v. IV., p. 69), and many manufacturers offered to sell it at almost any price, in order to get cash (v. IV., p. 69).

It was in this condition of the trade that Mr. Wayman got the manufacturers of Sanitary Enameled Iron Ware to take the licenses (Petitioner's Exhibits Nos. 9 and 11) from him.

The testimony is uniform and uncontradicted that with the Arrott invention it was possible to make the ware of uniformly good quality, to make it quicker, to make it with less effort to the workman, to make it substantially without regard to the difference in the enamelers, whereas by the former process the personal equation of the enameler himself was an important element in determining the quality of the ware he would produce *(supra*, pp. 46, 47).

The testimony shows that by the method in use prior to the adoption of the Arrott invention it was impossible to

make ware of uniformly good quality, that "seconds" were almost necessarily produced, and they of course had to be sold.

As many of the articles were crated or boxed, it was often impossible to tell until the article was delivered at the building in which it was to be installed whether it was defective or not, and even then an ordinary person could not, in most cases, tell that the article was a "second." It was only when it was subjected to the effects of hot and cold water and used that the defects developed.

Instead of the jobbers being forced by the manufacturers under the License Agreement (Petitioner's Exhibit No. 9), to enter into the Jobber's License Agreement (Petitioner's Exhibit No. 11), the jobbers were only too glad to do so (v. IV., pp. 26, 38, 45, 54, 59, 66, 72, 75, 77-79, 82, 85, 86, 92), because, as they testified, they were perfectly willing for the manufacturers to have a fixed price which gave the maufacturers a reasonable profit over cost, inasmuch as this would enable manufacturers to compete in quality (v. IV., pp. 35, 36) and the competition between the jobbers remained just as keen (v IV., pp. 37, 40, 46, 51, 53, 55, 60, 61, 68, 88, 93, 187, 188, 190, 191, 219, 220, 221).

The jobbers say that the result of the License Agreement was that the "seconds" disappeared from the market, the quality of the enameled ware was very greatly improved and could be relied on, and the manufacturers knowing the price that they could obtain, vied with each other in trying to improve the quality (v. IV., pp. 26-28, 45, 54, 58, 60, 61, 74, 78, 79, 82, 86, 87, 143); and that since January 1st, 1911, when the restrictions were removed, the quality of the ware has greatly deteriorated, and conditions are even worse than they were before the agreements went into effect (v. IV., pp. 33, 52, 60, 64, 74).

Counsel for the Government asked several of the witnesses if they were not able by the method employed prior to the introduction of the Arrott invention, to make ware which was salable commercially. Of course it was true that ware was made which was sold; in fact prior to the Arrott invention there was no other known way of making it, and the ordinary purchaser was unable to distinguish between "seconds" and

a first-class article whether the latter was made by the use of the Arrott invention or not. Moreover, there is not one of the witnesses who claimed that by the old method the ware could be made in ordinary commercial practice of as good quality as that made by the use of the Arrott invention. And Mr. Bentley gave (v. III., p. 369) a most forceful answer to the question.

The testimony is uncontradicted that almost immediately after the agreements (Petitioner's Exhibits Nos. 9 and 11) went into effect "seconds" disappeared from the market (v. IV., pp. 39, 40, 45, 55, 60, 73, 82, 83, 86, 92), and that the quality of the ware improved (v. IV., pp. 26, 27, 28, 45, 54, 58, 60, 61, 74, 78, 79, 82, 86, 87), and the consumer got an honest article and one for which he was paying (v. IV., p. 46, v. A., pp. 51, 63, 76, 97).

It was not sufficient, however, to secure the adoption of the use of the Arrott invention by the manufacturers, because as long as wholly unlimited competition in prices continued the temptation to turn out the goods as rapidly as possible, so as to further diminish the cost of producing them, greatly promoted the production of "seconds." Even with the Arrott invention care must be taken in order to produce high class articles.

With established prices a manufacturer would be enabled to devote his whole attention to improving the quality of the ware. The idea was graphically expressed by Mr. Clow, who said (v. IV., p. 35):

> "I mean a plan that establishes a price so that a manufacturer will make the best article he can under a fixed cost. In other words, I want to do just exactly the same as the United States Government has done where it has said in certain cases that they were willing to pay a certain price for an article and wanted the best article they could obtain for that price, and they fixed the price. We want the manufacturers to fix a price at which an article is to be sold and then buy from the manufacturer that makes the best article. That is the only way in the world that you can get the material improved." * * *

(p. 36) " The real advantage of this plan is that it reduces the cost to the consumer by establishing a fixed price at which the manufacturer sells the article and a fixed price at which the jobber sells it, so that there is no incentive for the jobber to go to some outside man and get him to make some cats and dogs that are principally bitch pups to put upon the public, for which they have to pay. You have broken up the best thing that ever happened in the plumbing supply business for the consumer and you have spread hell all through the plumbing supply trade by giving them condensed essence of compressed trouble."

The prices were fixed, as has been previously stated, at about 5 per cent. below the then printed prices of the manufacturers, and the prices could not be changed by Mr. Wayman except with the consent of a committee of the manufacturers, and it is not to be supposed that that committee would consent to Mr. Wayman establishing an unreasonable increase of price which would tend to limit the demand for their goods. On the other hand, the committee could only recommend any change in prices, Mr. Wayman having the final decision of the question. Enameled iron ware is installed by the use of fittings and plumbing supplies. Neither the Committee nor Mr. Wayman had any control, nor did they attempt to exercise any control over the terms or prices at which the fittings and plumbing supplies could be sold. As stated elsewhere, these fittings and supplies were sold by the manufacturers and jobbers at cost or below cost, with the result that there was no suppression of competition among the manufacturers to the jobbers, among the jobbers to the plumbers, or among the plumbers to the consumers, and no increase in price.

The fact that the prices fixed in these agreements were not any higher than the prices which had prevailed before should be conclusive evidence of the fact that the raising of prices was not the dominant purpose of the parties, and that the agreement as to prices was not entered into for the purpose of enabling them to extort high prices from the public, but inci-

dentally to the legitimate purpose of improving the trade, benefiting their own trade by improving the quality of the ware sold to the public and the reputation of Sanitary Enameled Iron Ware generally.

Consequently the majority of the Court below was in error in holding that the agreements in the case at bar "fixed prices. For that purpose they were made. They had no other" (v. A, p. 112).

Furthermore, the self-interest of the owner of the patent to get all the royalties that he could would be opposed to doing anything to decrease the volume of trade in Sanitary Enameled Iron Ware, because the more that was manufactured and sold the greater his royalties.

To put it in another way, the manufacturers allowed Mr. Wayman, in the first instance, to fix the prices at about five per cent. lower than the prevailing prices. By the terms of the agreements they deprived themselves of the right to raise these prices by giving Mr. Wayman a veto upon any change in the prices. They at the same time agreed to pay a net royalty, upon each furnace in operation, of one dollar per day. They thus made it to the interest of Mr. Wayman not to agree to any undue increase in prices for fear it would have the effect of diminishing the output, thereby reducing the number of furnaces in operation, and thus reduce his revenue from royalties. But for these provisions of the agreements the manufacturers might have been tempted to limit the production, at the same time charging higher prices ; but, under the licenses as they accepted them, they deprived themselves of this liberty and this power.

And the "Zones" (v. IV., pp. 190, 191), referred to in the price list were established in order to enable jobbers to know the cost price of the goods (v. IV., pp. 190, 191), and to put the jobbers in the different sections of the country upon an equality (v. IV., p. 190), so that the manufacturers could compete in all sections of the country (v. IV., p. 190), and the jobbers could compete in all sections of the country (v. IV., pp. 73, 190). The reason the manufacturers and jobbers made money without increasing the price was that, on account of

the uniform good quality of the ware, there were fewer returns and fewer claims.

The fact that the parties did not raise the prices should be taken as conclusive evidence, for the time being, that they did not form this combination for any such purpose ; whereas, the fact that they did eliminate the " seconds " is evidence that they did form a combination for the purpose of improving the ware.

If we are correct in the above view, then the so-called " combination " was a lawful one and not violative of the Sherman Act—no matter whether the case is governed by the patent law or not. If the purpose for which the combination is formed is not injurious to the public, but extremely beneficial to the public—if that be the object of the combination, and that object be accomplished by the use of means which in themselves have done the public no harm whatever—it is hardly conceivable that such a combination can be deemed to be illegal, or a violation of the Sherman Act, the very purpose of which is to protect the public.

The provisions of the licenses (Petitioner's Exhibits Nos. 9 and 11) are all reasonably adapted to the purpose for which such agreements were made ; that is, to promote the trade in Sanitary Enameled Iron Ware by elimination of " seconds " and the improvement of its quality—the dominant purpose of the licenses—and are in no wise such " as to give rise to the inference or presumption that they had been entered into or done with the intent to do wrong to the general public or to limit the right of individuals " (*Standard Oil Case*, p. 58).

The provision as to rebates to the manufacturers was reasonably calculated to secure the performance of the covenants entered into by the manufacturers.

The provision requiring the jobbers to purchase Sanitary Enameled Iron Ware only from the licensed manufacturers was reasonably calculated to prevent the further sale of " seconds " and the consequent demoralization of the market for Sanitary Enameled Iron Ware, and, at the same time, to extend the sale and use of licensed Sanitary Enameled Iron Ware.

The provision requiring the jobber to sell at not less than

a fixed price was reasonably calculated to enable him to continue to purchase licensed Sanitary Enameled Iron Ware and to push the sale of such ware, while at the same time, as was testified, on account of the fact that the ware was rarely sold by the jobbers without trimmings, competition between the jobbers was not affected.

It is said that the Standard Sanitary Manufacturing Company is back of this combination. It is insinuated that the idea of effecting it did not originate with Mr. Wayman but with the Standard Sanitary Manufacturing Company. At any rate, it is argued that if the Standard Sanitary Manufacturing Company did not originate it, after Mr. Wayman had originated it the Standard Sanitary Manufacturing Company adopted it and co-operated with Mr. Wayman in the effort to carry it out.

Suppose this be so, what wrong has the Standard Sanitary Manufacturing Company done to its rivals in business or to the public? Suppose that instead of doing what was done, the Standard Sanitary Manufacturing Company had declined to license any of the manufacturers at all, and being by far the largest manufacturers —having some 50 per cent. of all the furnaces—it had made use of the great advantage which it enjoyed by reason of its ownership of the Arrott patent and its larger capital, to undersell all its competitors and continued to undersell them until they were driven out of business, would that have been a more lawful or commendable proceeding in the eye of the Sherman law?

It is not pretended that the Standard Sanitary Manufacturing Company refrained from taking this latter course from purely altruistic motives. If it had adopted that course the effect would have been the disappearance of Sanitary Enameled Iron Ware from the market altogether, judging by conditions already arising in the trade, as disclosed in the testimony.

In order to compete with the Standard Sanitary Manufacturing Company those manufacturers who did not use the Arrott invention would have been obliged to resort almost entirely to the sale of "seconds." It costs a great deal less to produce "seconds" than it does high class goods, especially when one hasn't the use of the Arrott invention, and these

manufacturers would have sold " seconds " in order to compete as to price, with the ware produced by the Standard Sanitary Manufacturing Company by the use of the Arrott invention. But the fact that an article of Sanitary Enameled Iron Ware is a " second ", that is, is defective, is very frequently not perceptible except to the eye of the expert, and great quantities of this ware were already being sold and a great deal more of it would have been sold had the Standard Sanitary Manufacturing Company adopted the course suggested. The result would have been that the reputation of Sanitary Enameled Iron Ware—which had already been considerably damaged—would have become so bad that the jobbers would have ceased to handle it and used their influence to push the use of its rivals—vitreous china, porcelain and other forms of the articles. So that it must be clear that the *dominant* purpose of the parties was not to secure an enhanced price, not to limit the output, not to injure the public or any individual, but to benefit all parties engaged in the Sanitary Enameled Iron Ware trade, and to give the public the best possible article.

About a year prior to the making of the License Agreements (Petitioner's Exhibits Nos. 9 and 11) the Standard Sanitary Manufacturing Company had granted to the Colwell Lead Company, at the latter's request, a license to use the Arrott invention upon the payment of a royalty of $1 per day per furnace, that is at the same net royalty upon which the licenses in the case at bar were granted (v. III., pp. 474, 475). This shows that the purpose of the parties was not to suppress competition, since the Colwell Lead Company was a competitor of the Standard Sanitary Manufacturing Company in the sale of its goods, and the granting of the license by the Standard Sanitary Manufacturing Company tended to build up its competitor and extend its business rather than to restrain trade.

It also shows that the Colwell Lead Company deemed the use of the Arrott invention sufficiently valuable to justify the payment of the same royalty paid under the licenses in the case at bar, without any stipulation as to the maintenance of prices. The stipulation as to prices, contained in the licenses

in the case at bar, is merely in addition to and not in any sense an essential part of the consideration to the Colwell Lead Company.

The willingness of the Standard Sanitary Manufacturing Company to grant a license to the Seamless Steel Bath Tub Company shows a similar willingness to build up the trade.

In other words, the agreements were made with the intention of steadying the market, increasing the use of Sanitary Enameled Iron Ware, increasing the competition in such ware, giving the consumer an honest article of good quality, and enabling the manufacturer and the jobber to make a fair profit (v. IV., pp. 29, 30, 35, 36, 42, 46, 49, 58, 60, 67, 74, 87, 93). There was no intention, and there is no provision in the agreements, and there has been no action under the agreements, which was directed to interfering with the business of anyone outside of the agreement, either by under-selling them to injure their business, or by any other means to compel them to come into the alleged combination.

The agreement is very much less stringent than that upheld in *Mogul S. S. Co. vs. McGregor*, *supra*, which was cited by Mr. Chief Justice WHITE in the *Standard Oil* case as evidencing a contract, agreement, or combination which, at the time of the passage of the Sherman Anti-Trust Act, was held in England to be valid under the Common Law, and, consequently, under the Sherman Act (*Standard Oil decision*, pp. 56, 57).

This point can not be closed better than in the language used by Judge PUTNAM in the Shoe Machinery case (*United States vs. Winslow*, *supra*). That was a criminal case it is true, but the principles announced apply equally here. In that case a combination had been formed of several corporations controlling patents on machines for lasting, heeling, welting and soleing shoes, which substantially controlled the shoe manufacturing industry. Judge PUTNAM waived the patent feature and decided the combination was not in violation of the Sherman Law, saying in part (p. 592) :

> "This combination then formed was purely an economic arrangement, not in violation of any rule in

> restraint of trade at common law or which has been announced by the Supreme Court. * * * A combination * * * for the purpose of constructing economically and systematically and of furnishing any customer the whole or any part of a thing * * * is in strict and normal compliance with modern trade progress. Such being the fact, the law as explained by Chief Justice WHITE" (*U. S. v. Standard Oil Co.*, 221 U. S., 1, 58) "has kept hand in hand with 'developing trade' * * * (p. 593). We have examined every decision of the Supreme Court bearing on these topics, some * * * were decided or might have been on the ground that they involved agreements for the suppression of corporations having a public character. * * * All the other decisions involved the well known rule which prohibits stifling bids or portioning out territory arbitrarily. * * * None of them penalize a combination like that originally found in the present case * * * (p. 592). It is absolutely normal and in accordance with the rightful demand of the market."

The decision in the foregoing case might have been written for this case, the circumstances and reasoning are so appropriate.

But in This Case the Sherman Act Has No Application.

At the time the agreements (Petitioner's Exhibits Nos. 9 and 11) were entered into, Mr. Wayman was admittedly the owner of record of the patents therein referred to.

For the purposes of this case it is immaterial how he acquired them, whether they were given to him, whether he paid little or much for them, or whether the title was placed in him by the Standard Sanitary Manufacturing Company merely for the purpose of his making these licenses.

In *United States Fire E. C. Co. vs. Joseph Halsted Co.* (D. C., N. D., Ill., E. D., Apr. 16, 1912), 195 F., 295, the defendant sought to defend a suit for infringement by the Assignee of a

patent on the ground that the assignment was in aid of a combination in violation of the Sherman Act, and therefore void. The Court, SANBORN, D. J., said (p. 298):

> "A patent transfer is valid to pass title, even though made pursuant to unlawful combination. * * * Neither grantor nor grantee may question it. * * * Even though the sole inducement and consideration for the patent transfer were the expected benefits to be realized from the trust, yet this does not avoid it. * * * The sole value of patent property resides in monopoly. Within certain limits this monopoly may be made to extend to non-patentable property as just decided by the Supreme Court in Henry v. Dick." * * *

In *Bement vs. National Harrow Co., supra*, the Court said (p. 92):

> "But that statute" (the Sherman Anti-Trust Act) "clearly does not refer to that kind of restraint of interstate commerce which may arise from reasonable and legal conditions imposed upon the assignee or licensee of a patent by the owner thereof, restricting the terms upon which the article may be used, and the price to be demanded therefor. Such a construction of the Act, we have no doubt, was never contemplated by its framers."

In *Rubber Tire Wheel Co. vs. Milwaukee Rubber Works Co., supra*, the Court expressly held that the Sherman Law was not applicable to agreements under the Patent Law, saying (p. 362):

> "Congress, having created the patent law, had the right to repeal or modify it, in whole or in part, directly or by necessary implication. The Sherman Law contains no reference to the patent law. Each was passed

under a separate and distinct constitutional grant of power; each was passed professedly to advantage the public; the necessary implication is not that one iota was taken away from the patent law; the necessary implication is that patented articles, unless or until they are released by the owner of the patent from the dominion of his monopoly, are not articles of trade or commerce among the several states.

"The evils to be remedied by the Sherman Law are well understood. Articles in which the people are entitled to freedom of trade are being taken as the subjects of monopoly; instrumentalities of commerce between which the people are entitled to free competition were being combined. The means of effecting and the form of the combination are immaterial; the result is the criterion. The true test of violation of the Sherman Law is whether the people are injured, whether they are deprived of something to which they have a right."

This was an action to recover royalties under a license agreement almost identical with the license agreements in the case at bar; so that the case is on all fours with the present case.

See, also,

Goshen Rubber Works vs. Single Tube A. & B. Tire Co., supra.

Indiana Mfg. Co. vs. J. I. Case Threshing Mach. Co., supra.

The cases in which it has been held that a violation of the Sherman Act is no defense in infringement suits, are numerous.

In *Johns-Pratt Co. vs. Sachs Co. et al.*, 176 F., 738, the Court said (pp. 739, 740):

"The question of law which stares us in the face is this: Does an allegation that the complainant is a party to an unlawful conspiracy, which tends to restrain trade and oppress the defendant in its business, afford any defense to a suit for the infringement of letters patent, the title to which is vested in the complainant?

"This question has been answered in the negative by the courts with such unanimity and decisiveness that it would be wasted energy for me to do more than cite National Folding Box & Paper Co. v. Robertson (C. C.), 99 Fed., 985, in which my very dear friend, the late Judge TOWNSEND, examined the matter with care."

See, also,

Otis Elevator Co. vs. Geiger, 107 F., 131.
National Folding Box & Paper Co. vs. Robertson, 99 F., 985.
Bonsack Machine Co. vs. Smith, 70 F., 383.
Strait vs. National Harrow Co., 51 F., 819.
Brown Saddle Co. vs. Troxel, 90 F., 620.
Soda Fountain Co. vs. Green, 69 F., 333.
Edison El. Light Co. vs. Sawyer-Man Co., 53 F., 592.
Columbia Wire Co. vs. Freeman Wire Co., 71 F., 306.

Under the head "The Law of Patents" (*supra*, pp. 32-37) it has been shown that, under the laws of the United States and the decisions construing them, the owner of a patent may impose upon his licensees any conditions that he pleases; that he may fix the prices at which his immediate licensees shall sell, and also the prices at which those buying from such licensees shall sell; that he may restrict his licensees and those who purchase from them, as to the persons with whom they shall deal; that he may prescribe that his licensees and those who purchase from his licensees shall deal only in the licensed articles; that he may impose like restrictions upon unpatented articles, if handled by his licensees or those who purchase from his licensees; that he may prescribe that his licensees shall sell the articles produced under the terms of the license only through him, thereby enabling him to fix prices and conditions of sale; that he may prescribe that his licensees and those who purchase from his licensees shall procure articles used in connection with the article produced under the license only from the licensor, or from persons designated by the licensor; and, finally, any condition that is reasonably adapted to promote the use of the invention, protect and en-

hance its reputation, secure greater returns to him from the invention and secure the making of such returns.

The following quotations are from cases in which the facts were similar to those in the case at bar and amply support the foregoing statement:

> "If * * * a stipulation in an agreement between patentees and dealers * * * which fixed a price * * * would be a reasonable and valid condition, it must follow that any other reasonable stipulation, not inherently violative of some substantive law, imposed by a patentee as part of the sale of a patented machine, would be equally valid and enforceable" *(Henry vs. A. B. Dick Co.*, 224 U. S., 1, 31).
>
> "The course of the law is not to be turned aside because the practical result may be to give a patentee for the time being more than the patent office contemplated" (*Henry vs. A. B. Dick Co.*, 224 U. S., 1, 33; *Dovis Electrical Co.*, 60 F., 276, 280; *Thomson-Houston Co. vs. Kelsey Co.*, 72 F., 1016).
>
> "The power to make such leases" (in the case at bar licenses) "appears to be within the protection granted by the patents" *(United Shoe Machinery Co. vs. Euclid L. La Chappelle, supra).*
>
> "Whatever else may be said of such monopoly, it nevertheless is built on the patent and not a combination" *(United Shoe Machinery Co. vs. Euclid L. La Chappelle, supra).*

As long as the provisions contained in the licenses are such as are calculated to secure to him the advantages derived from the ownership of the monopoly covered by the patent, he may lawfully make them without regard to his motive or intention, and no question can be raised as to the use of the patent being a subterfuge, or as to whether the agreements are made in good faith or not.

It is only when there are included in the licenses some provisions entirely outside of the right of the licensor to enhance the value to him of his invention, or provisions which are on the border line between his right to prescribe any conditions which enhance the value of the invention to him and

provisions entirely outside of such right, that the question of good faith of the transaction arises.

If the question of good faith is to be considered, defendants insist that they shall be allowed to take the testimony of all the defendants as they can prove among other things that the licensees were required to instal the Arrott invention and were warned that, until they did so, they could not treat their product as coming under the terms of the license.

The value of the invention in the manufacture of Sanitary Enameled Iron Ware is thoroughly established by the testimony (*supra*, pp. 38–50).

The Government's contention is that the license went too far in fixing a price upon the product of the use of the Arrott invention.

No authority was cited for this proposition, and, on principle, it would seem clear that the decisions cited in the brief to sustain the proposition that the owner of a patent has the right to prescribe conditions apply to this case.

A great deal was made below on the part of the Government of the terms used in Petitioner's Exhibits Nos. 9 and 11, which, it was said, evidenced the fact of an intent to deceive and that the licenses were fraudulent.

There is no allegation in the petition of any facts which would constitute a fraud, consequently what was said in this connection has no place in the case, and should be disregarded by the Court.

The most that is alleged in the petition is (v. A, p. 9):

> "The sole purpose of the assignments was that the patents might screen the real intent of the defendants and serve as a mere subterfuge and device to evade the Sherman Anti-Trust Law."

This is only an allegation of a conclusion and insufficient, even if it be construed as an allegation tending to allege fraud. The rule is that the allegation of fraud is insufficient unless the facts from which the fraud can be inferred are stated.

But it is submitted that the words used in the licenses were used properly.

In the specification of the Arrott patent (v. II., pp. 190,

192), the former method of enameling is described, the objects sought to be attained by the invention set forth, and the manner of operation and the effect produced by the use of the invention detailed.

Since by the use of the Arrott invention a piece of cast iron, in the shape of the article desired, is converted into what is apparently an article made of white porcelain, it would seem fair to speak of its use as practicing a process, or method of manufacture.

While technically a patentable process means the application, or operation, of some element or power of nature, or the use of one thing with another to produce a new result, as tanning, dyeing, smelting ores, or the like—for instance, a driven well is held to be a patentable process (*Boyd vs. Cherry*, 50 F., 279, 282; *Andrews vs. Carmen*, 1 Fed. Cas., 868, 870, 871; *Risdon Iron and Locomotive Wks. vs. Medart*, 158 U. S., 68), the change wrought by the use of the Arrott invention in applying the enameling powder to the cast iron article is sufficiently analogous to a "patentable process" to be called a process.

So the statement in the license that the licensee was licensed "to use and sell goods so made" was a fair statement of the facts, since the licensor might have granted the license simply to make and use the invention without giving the right to use, or sell the product of the use.

A similar statement is sufficient as to the objection to the terms used in the Jobbers' License Agreement and in the labels, etc.

Therefore, the Government's contention with regard to the terms used in the agreements being evidence of deceit or fraud, falls to the ground. Actual fraud never turns on a quibble of words.

It was also contended that the defendants gave evidence of "conscious wrongdoing by the form in which the various transactions were embodied." Had the quotation, which is taken from the decision in the Tobacco Case been completed it would have been as follows (p. 182):

> "by the ever present manifestation which is exhibited of a conscious wrongdoing by the form in which the *various* transactions were embodied from the beginning, ever changing, but ever, in substance, the same"

and it would have appeared that the quotation was entirely inapplicable to the present case.

Certainly the owner of a process patent could prescribe in his license to use the process, that he should receive as royalty for the use a certain percentage of the product of the use (*Henry vs. A. B. Dick Co.*, 224 U. S., 1, 32). If he could do this, which would be not only to control the disposition, but to secure the title to a portion of the product, he certainly could prescribe the price or conditions upon which the product could be disposed of. In certain cases this might be essential to his securing any income from the use of his invention. It is admitted on all sides that under the Patent Laws an inventor can, by reason of his right of exclusion, acquire all the benefit possible from his invention.

The foregoing being true, it seems to follow, as the day the night, that Mr. Wayman as the owner of the patent could fix the price and prescribe the conditions at and upon which the product of the use of the Arrott invention should be disposed of.

The suggestion below that the price might have been fixed upon the dredger, is utterly inapt, since the licenses do not purport to license the manufacturers to make and sell the dredger, but only to make and use it.

We do not contend here that Mr. Wayman could limit his Licensees' power or right to sell an unpatented article. That is a question by itself. What we do claim is that his right to exclude others from using the invention empowers him to prescribe the conditions on which an article made by the use of his invention should be sold, which is an entirely different proposition (*Henry vs. A. B. Dick Co.*, 224 U. S., 1, 24)

The Government contends that the provision in the Jobbers' License Agreement (Petitioner's Exhibit No. 11, par. 10) prohibiting the Jobber from purchasing Sanitary Enameled Iron Ware from an unlicensed manufacturer, under penalty of being unable to purchase thereafter from licensed manufacturers and of forfeiting his discounts or rebates then held by the Licensor, goes beyond what is permissible to the owner of a patent. Similar provisions are common in patent licenses. The owner of a license, in order to introduce his invention may prescribe that the Licensee shall devote his whole time to the exploitation of the invention. He may prescribe that he shall handle

no articles of a like character. The *Bement Case (supra)* upheld such a provision, and other cases are cited in this brief to the same effect.

But in this case there was something more. As has been said, the dominant purpose of the parties to this agreement was to do away with "seconds," and to improve the reputation by improving the quality of Sanitary Enameled Iron Ware so as to re-establish it in the market and to prevent further inroads upon it of porcelain and vitreous china, and other forms of competitive articles. The only way by which this could be accomplished in Mr. Wayman's opinion was to have all the manufacturers use the Arrott invention, and to prescribe that those using it should not manufacture or sell "seconds."

As has been explained, with the Arrott dredger, with proper care, articles of uniform good quality could be made without regard to the individuality of the enameler; but if the enameling was done carelessly, hastily and without proper inspection "seconds" might be produced though the Arrott dredger was used.

Paragraph 10, therefore, was an entirely proper provision under the Licensor's right to protect and enhance the value to him of the invention. By it Jobbers were not permitted to purchase Sanitary Enameled Iron Ware except from licensed manufacturers and the manufacturers of licensed Sanitary Enameled Iron Ware were prohibited from making or selling "seconds." There is nothing reprehensible in this.

By his system of auditing the books of the various Licensees (manufacturers and jobbers), Mr. Wayman could check the jobbers and ascertain if they had any "seconds," and, upon tracing these "seconds," could find (*a*) whether the jobbers were observing their contracts; and also (*b*) whether the manufacturers were keeping their covenants; and he would learn of "seconds" through complaints from the jobbers. The established prices dealing only with sound articles, if "seconds" were found, it would mean the manufacturers were violating their contracts.

Moreover, the fact that the jobbers would purchase only Licensed Sanitary Enameled Iron Ware tended strongly to increase its sale, since the public was thereby induced more generally to purchase licensed Sanitary Enameled Iron Ware.

It did the public no injury because the testimony is over-

whelming, and entirely uncontradicted, that the Sanitary Enameled Iron Ware produced by the use of the Arrott invention was much better than that produced by any other method.

Further than this, as was said in the *Bement case (supra)* there is nothing in the agreements here to prevent the manufacturers from adopting any improvements in the manufacture of Sanitary Enameled Iron Ware, nor to prevent the jobbers purchasing from the licensed manufacturers ware made by the use of such improvements, and this without being in any wise penalized.

Consequently the public was benefited either way.

There is no provision in the agreements which imposes any penalty, or in any way tends to attack or injure any independent. All were admitted on the same terms (v. IV., p. 173; *United States vs. Terminal R. R. Ass'n,* 224 U. S., 383, 410).

Construed in the strictest manner, the License Agreements (Petitioner's Exhibits Nos. 9 and 11) deprive the public of nothing to which it is entitled (*Henry vs. A. B. Dick Co.*, 224, U. S., 1, 31, 32). They do not create a monopoly in the sense in which that term is used in the Sherman Act or operate as a restraint of trade, since they affect only the ware which is produced by the use of the Arrott invention.

Inasmuch as the public has no rights whatever in ware thus produced, save such as the owner of the invention which produces it may choose to grant, no wrong has been done in any event. No one can use the Arrott invention without Mr. Wayman's consent. Consequently no one can get Sanitary Enameled Iron Ware made by the use of the Arrott patent without Mr. Wayman's consent. From which it follows that no one can get Sanitary Enameled Iron Ware made by the use of the Arrott invention, except upon such terms as Mr. Wayman may impose, and no one has any right to get such ware at all.

In the words of a recent opinion of this court "by selling it subject to the restriction he took nothing from others and in nowise restricted their legitimate market" (*Henry vs. A. B. Dick Co.*, 224 U. S., 1, 32) and "the public permitting the invention to go unused loses nothing which it had before" (*Henry vs. A. B. Dick Co.*, 224 U. S., 1, 34, 35).

Similarly it has been held as to contracts not to disclose trade secrets because the public has no right thereto (*Peabody vs. Norfolk*, 98 Mass., 452; *Jarvis & Lobdell vs. Peck*, 10 Paige, 118; *Vickery vs. Welch*, 19 Pick. (Mass.); *Tode vs. Gross*, 127 N. Y., 480; *Thum Co. vs. Tloczynski*, 114 Mich., 149; *Bryson vs. Whitehead*, 1 Sim. & Stu., 74; *Harrison vs. Glucose Sugar Refining Co.*, 116 F., 304, 311), which cases are not inconsistent with the decision in *Dr. Miles Medical Co. vs. Park & Sons*, 220 U. S., 373, because there it was the sale of the article made by the use of the trade secret and the distinction analogous to that between the invention and the patented article was recognized.

It may be conceded that there are limitations upon the right of vending and using a patented article if it belongs to a class which on account of its inherent danger to the public safety or health cannot be sold or used because prohibited by an exertion of the police power of the state (*Henry vs. A B. Dick Co.*, 224 U. S., 1, 29; *Patterson vs. Kentucky*, 97 U. S., 501; *Webber vs. Virginia*, 103 U. S., 344, 348; *Allen vs. Riley*, 203 U. S., 347; *United Shoe Machinery Co. vs. Euclid L. La Chapelle, supra*); but that does not include bath tubs which the same theory commends, and refers to the article not the invention overlooking the distinction pointed out in *Henry vs. A. B. Dick Co., supra.*

In *United States vs. Winslow*, 195 F., 578, 594, the court said, referring to the contention that the parties to the combination controlled 90 per cent. of the trade "we do not attach much importance to this percentage because that standing alone is like one term of an algebraic equation which of itself is non-efficient". In the case at bar, it was claimed defendants controlled 85 per cent.

The Government's argument below was made from the standpoint, which its evidence failed to establish, of a preconceived idea of the facts in the case.

The "underlying atmosphere" referred to in his argument by one of the Government's counsel below is what is spoken of by Judge SEVERENS in *Darius Cole Trans. Co. vs. White Star Line* (186 F., 63, 69) as "suspicions * * * that the parties intended something wrong", and as he says "cannot impeach" a contract if its provisions "are not unlawful and their due performance is not unduly prejudicial to the public", so long

as the proof "does not go to any act or fact extraneous to the contract."

The Government admitted in the argument below that the idea of the licensing system was Mr. Wayman's, and that he sought to establish it for his individual benefit; but it says that the manufacturers and jobbers wanted a resale price and that they seized upon Mr. Wayman's idea and used him to enter into an arrangement in violation of the Sherman Anti-Trust Act.

It is matter of common knowledge that a person seeing an opportunity of bettering himself by securing control of a patent and granting licenses thereunder frequently (as soon as he ascertains that he can secure control of the patent, it matters not whether by an enforcible written contract, a formal option, or merely by the promise of a person upon whose word he has a right to rely) proceeds to ascertain whether or not he can secure the licensees he desires.

If Mr. Wayman's ambition was a legitimate ambition, if his project was a lawful project both in its inception and consummation, the means employed by him for its accomplishment are of no concern if they too are legal. As a matter of fact he could not have proceeded otherwise than he did and achieve the results contemplated.

Whether the arrangement with Mr. Dawes, as to Mr. Wayman's securing control of the Arrott patent, was a formal option or not, Mr. Wayman was entirely justified in proceeding forthwith to try and get the manufacturers to take licenses from him under that patent; and Mr. Wayman and Mr. Dawes believed it to be an option and treated it as such.

Mr. Wayman testified that after receiving the options he approached the manufacturers, in the first instance, individually. After he had secured the consent of a number of them to enter into license agreements with him upon the general terms he outlined, it was natural and entirely proper that he should bring them together in order that the details of the licenses might be discussed.

It was essential that the licenses granted to the various manufacturers should be, in general terms, uniform. No manufacturer would take a license upon less advantageous terms than those given his competitor. Moreover, competitors in business are naturally suspicious of each other, and if, after

he had secured from the individual manufacturers the consent to accept licenses upon the general plan outlined, Mr. Wayman had attempted to reach an agreement with each manufacturer separately upon the details of the license, he would have had an almost interminable job.

The natural way, substantially the only way, was to get the manufacturers together and discuss with them the terms which he was willing to make, and they to accept, in the licenses.

When, as was the fact at the meeting at the Hotel Astor, it was found impossible with so many to successfully discuss and fix upon the details, the natural, ordinary way was to have the manufacturers designate a number of their members, sufficiently small to be manageable, to confer with Mr. Wayman in regard to the matter.

Hence the Price and Schedule Committee. That the expenses of the Committee should have been paid by subscription of the manufacturers was only proper. The evidence is—and it is not disputed by the Government—that Mr. Wayman paid his own expenses. Whether he paid them from the salary he received as Commissioner of the Association or by pawning his chattels is immaterial.

No inference against the validity of the patent agreements is to be drawn from the fact of the meetings of the manufacturers, from the appointment of the so-called Price and Schedule Committee, from the meetings at Mt. Clemens or from the manner in which the expenses of the Committee were paid.

The argument below of the representatives of the Government that in the correspondence the elimination of "seconds" as the object to be accomplished is not mentioned, is answered by the fact that all of the correspondence treats of the bad conditions existing in the trade, which bad conditions, the testimony shows, were due almost entirely to the existence of "seconds," and to the further fact that it was believed a price agreement was illegal unless founded on a patent. When this was suggested, naturally that was prominent in the correspondence.

To summarize the situation: the trade in Sanitary Enameled Iron Ware was demoralized. The ware itself was discredited, owing to the prevalence of "seconds". To reestablish the business and the reputation of the ware it was

necessary to eliminate "seconds" from the market. This could not be done without an agreement as to prices. Was a price agreement ever lawful? Who knows positively to this day? But if the manufacturers could be induced to manufacture their wares by means of the Arrott invention there would be no excuse for turning out defective goods; and if, as a condition of licensing the use of said invention a staple price could lawfully be imposed for the sale of ware made by its use and the marketing of "seconds" prohibited, the problem would be solved. This was Mr. Wayman's scheme in a nut-shell. All of the innuendoes and insinuations of counsel for the Government cannot make it other or different. If it was wrong, so be it. But before pronouncing it wrong please to note that it had the effect intended without complaint from jobbers, plumbers, or the general public. Only the Government complains. What of? The ultimate purchaser got a better article at no greater cost, while competition was substantially as rife as ever, except that it took the form of better goods for the price or collateral bonuses in the way of plumbers' materials and supplies.

As we have already shown, the resale agreement was a necessary part of the plan to eliminate "seconds," improve the quality of the ware, and increase the demand for Sanitary Enameled Iron Ware.

Similarly, after Mr. Wayman had persuaded Mr. Dawes and the Standard Sanitary Manufacturing Company of the advantages to be derived from the acceptance of his plan, it was natural that Mr. Ahrens, the president of that company, and Mr. Torrance, its vice-president, should be interested to aid Mr. Wayman in extending the plan as much as possible, and this accounts, in a natural, reasonable and proper manner, for the actions of those gentlemen and the letters which they wrote, but which the Government seeks to torture into evidence of a violation of the Sherman Act.

The argument made on behalf of the Government that Mr. Kohler, Mr. Kelly and others were sought to be forced into entering into the License Agreements is not supported either by the evidence or by the facts. The most that can be claimed from the evidence is that Mr. Wayman and, at his request, Mr. Torrance, Mr. Ahrens and others, tried to persuade Mr. Kohler, Mr. Kelly and others to enter into the License Agree-

ments by pointing out to them the existing difficulties in the trade and the advantages to be gained by the License Agreements. This is all that was done at the various meetings with these gentlemen, either separately or together, or at the meeting in Philadelphia between Mr. Kelly, Mr. Wayman, Mr. Torrance and certain jobbers, as to which the Government makes the claim that it was an attempt by the Standard Sanitary Manufacturing Company to compel those jobbers to take License Agreements. There was no attempt at coercion, intimidation nor was any fraud practiced.

Paragraph 10 (Petitioner's Exhibit No. 11) was not designed to interfere at all with the trade of the so-called independents, but rather to promote the use of the invention by extending the sale of the product of its use.

On behalf of the Government considerable stress was laid below upon the fact that after the removal, on January 1st, 1911, of the restrictions other than those as to the making and selling of "seconds" and the payment of royalties, the ware deteriorated in quality notwithstanding that the manufacturers continued to use the Arrott invention. It is argued from this that the use of the Arrott invention is not as essential to the manufacture of good Sanitary Enameled Iron Ware, as is claimed by the defendants.

The argument is a *non sequitur*, for the reason that, in addition to the manufacturers who did not take licenses, and which included such large manufacturers as J. M. Kohler Sons Co., and Iron City Mfg. Co. (Kelly's Company)—the latter according to the testimony sold by the run of the kiln—the Cahill Iron Works and the Kerner Mfg. Co. had given notice of withdrawal from the licenses prior to January first, 1911, and therefore could not use the Arrott invention without infringing the patent and being liable to Mr. Wayman for damages.

There were also the Blairsville Enameled Ware Co., the Clymer Mfg. Co., Louis Lipp, Washington Iron Works, Vollrath, Jones-Holloware Co., and the Rundle Mfg. Co. The independent manufacturers had 40% of the furnaces in operation (v. IV., pp. 173, 174).

Another reason for the re-appearance of "seconds" may well have been that when the jobbers' licenses expired on December 31, 1910, some of the licensed manufacturers relaxed the rigor of their inspection, and endeavored to make as many

articles as possible without regard to the quality. As has been said, if the Arrott invention was used without proper care simply to produce articles quickly, defective articles might occur even when it was used.

One of the witnesses testified that, out of a shipment amounting to $4,000, after the restrictions were removed, $1,500 worth was rejected, and the manufacturer made a 50 per cent. reduction (v. IV., p. 74). This shipment was from a manufacturer who had adopted a new enameling powder said not to contain oxide of tin, which would easily account for the defective articles.

A further reason for the re-appearance of "seconds" may have been the fact that Mr. Wayman no longer had the right to audit the books of the jobbers so as to find if they had any "seconds" on hand, and there was no relation between him and the jobbers which permitted the jobbers to complain to him that they had received "seconds" from licensed manufacturers.

No inference is therefore to be drawn against the value of the Arrott invention in the manufacture of Sanitary Enameled Iron Ware from the re-appearance of "seconds" in the market after the removal of the restrictions January 1st, 1911.

The Hotchkiss, Vail & Garrison Company were referred to below as being very high class jobbers and had built up a trade *de luxe* in New York, and the statement was made that they were among the jobbers whose trade was being restrained by the defendants. It appears that the Hotchkiss, Vail & Garrison Company wrote to Mr. Wayman stating that they did not desire to comply with his request that they itemize the articles in their bills, because it was their practice to change the names of the tubs and to sell the enameled ware articles as their own and in connection with elaborate fixtures, and to give lump sum prices, and that if they were required to itemize the bill it would disclose to the plumber that they charged more for the sanitary enameled ware than the schedule of prices set forth in Mr. Wayman's price list (v. II., p. 180).

Claims Made on Behalf of the Government Not Sustained.

To answer shortly some of the claims made below on behalf of the Government, which the defendants deny:

It cannot be truthfully said that Mr. Wayman, who as

Commissioner received a salary of $4,000, and who as the owner of the patent and the licensor expected to make from $25,000 to $30,000, if not more, a year, was not the person principally interested in putting through the licensing system.

The reasons for the Standard Sanitary Manufacturing Company assigning the patents to Mr. Wayman and entering into the License Agreements were simply business propositions. By doing so they secured the re-establishment of Sanitary Enameled Iron Ware in the favor of the public, the increase of its sale, their share of which would be one-half, competition under more favorable conditions with their rivals, and a price upon which they could count. It received $10,000 in cash. It was compelled, if it desired the lesser manufacturers to take licenses and pay a royalty, to do the same thing itself, or otherwise the lesser manufacturers would have been at a disadvantage equal exactly to the amount of royalty paid.

But it is argued that the Standard Sanitary Manufacturing Company, under the facts in the case, did not receive any direct monetary benefit; this loses sight entirely of the compensating benefit it received in the increased sale and popularity of its product, the avoidance of long and slow infringement litigation necessary to protect its patent, and that it expected, naturally, a much greater return in the future by reason of the general improvement in Sanitary Enameled Iron Ware, the increased popular demand created thereby, and the naturally to be expected increase in the sale of its own product, since that is about 50% of the whole sold in the United States.

There was nothing in the fact that the agreement to assign the patents provided that at the end of two years the assignor might reclaim them while the assignment was absolute. This is not an uncommon form. The assignment is recorded at the Patent Office and the assignee becomes the owner of the patent as to all the world except the assignor, who, as against the assignee, may require the reassignment of the patent at the expiration of the time limit.

The letters of April 16, 1910, one of which appears (v. II., p. 229) are not at all inconsistent with the defendants' contention that the so-called Price and Schedule Committee, elected by the manufacturers and which met at Mt. Clemens, was advisory and that Mr. Wayman merely conferred with them with regard to the details of the agreements.

The resolution in the minutes of the meeting of February 1, 1910, and Mr. Wayman's letter to Mr. Conchar (v. II., p. 12; v. IV., p. 235) are entirely consistent with Mr. Wayman's explanation and with the defendants' claim. Mr. Wayman's references to the plans then being formed as those of the manufacturers clearly means that they were both his and the manufacturers', since he was trying and expected from his conferences in January with the manufacturers to get them to adopt the plans he proposed.

The letter from Mr. Wayman to Mr. Frank S. Hanley (v. I., p. 121) upon which the Government below laid stress because of the expression therein "No concerted action on this matter was taken for reasons which you well know," was explained by Mr. Wayman at the time of its introduction (v. I., p. 123), as meaning that since the jobbers had been for years trying to get the various enameled ware associations to act as a body in passing such resolution, without success, it was not to be expected that the Association would now do so.

In Mr. Ahrens's letter to Mr. Kohler (v. I., p. 254, Petitioner's Exhibit No. 147) Mr. Ahrens refers to the great amount of trouble which jobbers had with enameled iron ware, which was explained in the testimony to have been on account of the existence of "seconds."

In the letter from Mr. Torrance to Mr. Sullwold (v. I., p. 302, Petitioner's Exhibit No. 161) he refers to the bad conditions existing, due, as was testified to, to the existence of "seconds," and that he had worked to bring about the licensing arrangement for the benefit of the Standard's customers. That letter is dated June 16, 1910, so that the eight weeks during which the Government below contended that Mr. Torrance was busily engaged inducing jobbers to sign licenses would carry it back to about the first of May, when it was natural to be supposed that he was interested in working to bring about success, since his company had consented to, and on May 6, 1910, did take a license. This, however, does not at all affect the defendants' claim that it is a patent proposition and was Mr. Wayman's.

The appellants make no claim that the establishing of prices on the product of the use of his invention was not a part of Mr. Wayman's plan (v. IV., pp. 231, 232).

The Court below (v. A, p. 110) in considering whether the

prices were raised is misled into thinking that the prices were raised by referring to some correspondence between the Standard Company and one of its customers, and draws the inference that that customer had a confidential 7½ per cent. discount from the Standard Company below the carload limit price, and that this was below the published prices and published discounts.

The evidence shows that this supposed customer had never been a customer of the Standard Sanitary Manufacturing Company but had been a customer of the United States Sanitary Manufacturing Company (v. I., p. 542), and the alleged confidential 7½ per cent. discount is not a statement under oath but merely a claim made by the writer that he had had such a discount from some other manufacturer. The writer of the letter, one Collins, was on the witness stand but was not examined as to this supposed discount. The most that can be said of it is that it is a statement made by a man wanting to buy goods by which he hoped to get a cheaper price. It is in no way evidence of the fact and should be disregarded (v. I., p. 541).

In the letter from Mr. Ahrens to Mr. Murphy (v. I., p. 258; Petitioner's Exhibit No. 148), Mr. Ahrens says that he believed it was to his customers' interest to put the plan through, and that the interest of his customers demanded it. This is entirely consistent with the claims of the appellants that the dominant purpose was to eliminate "seconds" and thereby re-instate the ware in the favor of the public, and enable those dealing in it to make a reasonable profit, and to insure the consumer getting an honest article.

The testimony, references to which were made in the argument below to maintain the claim that it was a deliberate scheme "to beat the Sherman Act," do not support the contention. It merely appears (v. I., p. 73) that Mr. Jackson, at Mr. Wayman's request, discussed the legal features of the License Agreements with those present at the meetings at the Hotel Astor; (v. I., p. 83) that the proposed License Agreements had been passed upon by counsel; (v. I., p. 97) that Mr. Kohler wrote he had been advised that it was in conflict with the laws of Wisconsin; (v. I., p. 99) that Mr. Wayman telegraphed that after a consultation they were all satisfied that the pro-

position was legal; (v. I., p. 11) that Mr. Wayman wrote Mr. Kohler that the meeting for the execution of the License Agreements would be held at the offices of Noble, Jackson & Hubbard; (v. I., p. 138) that in addition to Mr. Jackson, Governor Walter Lyon, Messrs. Bakewell & Byrnes, and other lawyers were consulted; and (v. I., pp. 113, 115) that at a meeting of the Sanitary Enameled Ware Association, held October 6, 1909, a resolution was adopted instructing the Commissioner to prepare a resolution, not in violation of the law, with regard to the policy of selling concerns who resold directly to the consumer. It is impossible to see wherein any of these things support the claim of the Government. The last, which seems to be the kernel of the proposition—the resolution adopted by the Association—certainly does not refer to resale prices or to prices at all, but to the manner in which the manufacturer should deal with one who instead of acting as a jobber or wholesaler and selling to the plumber or retailer and letting the plumber or retailer sell to the consumer, himself sold direct to the consumer. The usual course of trade is for the manufacturer to sell the jobber, the jobber to sell the plumber, and the plumber to sell the consumer. For certain trade reasons this course of dealing is important. When a jobber sells direct to the consumer he violates this trade regulation and it was such a case to which the resolution referred.

The references given to show that the agreements in question restrained trade are the following: (v. I., p. 229) the testimony of a representative of the Illinois Malleable Iron Company, that not having signed the Jobbers' License Agreement he could only purchase licensed goods at resale prices from other jobbers; (v. I., p. 334) the testimony of Mr. Gilmore that he could not get licensed goods without signing the agreement; (v. I., p. 367) similar testimony from Mr. Harder; (v. I., p. 374) similar evidence; (v. I., pp. 389, 405, 415, 425) similar evidence. As to this, the defendants make no controversy since they claim the right to do what was done.

The reference to the letter from Mr. Wayman to Mr. Haff (v. I., p. 407; Petitioner's Exhibit No. 233) was evidently made under a misapprehension as to the meaning of that letter. That letter merely means that when prices were cut by jobbers who had not signed the License Agreements, the

manufacturers would urge Mr. Wayman to allow them to meet such cut.

The Government's representatives, in their argument below, apparently misconceived the cases.

Cases Relied on by the Government Distinguished.

We will not discuss all of the cases but merely refer to those upon which particular stress was laid.

In the case of *Dr. Miles Medical Co. vs. John D. Park & Sons Co.* (220 U. S., 373), the Court pointed out that the complainant had no statutory grant, such as is conferred by the *patent law*, and that while the complainant might have given the right to use its secret process under conditions, it could not, after Peruna had been made by the secret process, sell Peruna itself and attach any conditions with reference to the disposition to be made of the Peruna. That is not this case, and consequently it is not an authority in this case. This court pointed out in *Henry vs. A. B. Dick Co.* (224 U. S., 1, 39) that there was no collision between the rule against restrictions on the disposal of unpatented articles and the right of the owner of a patent through his control over the invention.

The Court's attention is directed to the fact that in the *Miles Medical Case (supra)* the Court, cited among other cases, *People vs. Sheldon*, 139 N. Y., 251, for the proposition that contracts whose sole purpose was the suppression of competition and fixing of prices are illegal. That was a case which arose under a statute of the State of New York prohibiting the fixing of prices, upon articles of prime necessity. The articles upon which the price was fixed was an article held to be one of prime necessity, and consequently the decision there rests upon the statutory inhibition. An examination of the other cases shows that in each there was some feature which brought it within the prohibition of the law other than the mere fixing of prices or partial suppression of competition.

It was the *Miles Medical Case* upon which the Court below relied for the doctrine that the agreements in the case at bar violated the Sherman Act, but the facts in the case at bar do not justify the contention that the sole object of the parties to them was the suppression of competition and the fixing of prices, nor does the *Miles* case hold that such agreements are all necessarily illegal.

In the case of *Continental Wall Paper Co. vs. Voight & Sons* (212 U. S., 227), no patent was involved, and the contract was said by the Court to be one of the worst examples of attempt to monopolize a necessary article that ever came under its view.

In the case of *Blount vs. Yale & Towne Mfg. Co.* (166 F., 555), three parties agreed to interchange licenses under their various patents, and at the same time agreed that each should continue to use its own patents and not use the patents of either of the others; and that they should not change the patterns of their door checks or make any difference in the conduct of their business. The Court, Judge BROWN, held that such an agreement was not a patent license agreement at all; that there was an expressed intention not to use the license, and that the injection of the license feature into the matter had no effect, but the agreement was to be treated just as though that feature did not exist.

It is interesting to note that the Judge who decided the *Blount Case* decided in *Brodrick Co. vs. Roper* (124 F., 1019), that the owner of a patent had the right to sell on condition that the patented article should only be used with unpatented supplies furnished by the licensor.

The Government is in error in supposing that the *Rubber Tire Wheel Case* is not applicable here. That case holds that the limitations which were imposed in that case and which were upon the patented article, were valid; but it goes further and holds that the owner of a patent may establish what is called a patent pool.

The *Henry vs. A. B. Dick Co. Case*, the *Button Fastener Case*, the *Mimeograph* and *Neostyle Cases*, and the *Phonograph Cases* carry the proposition further, and hold that the owner of a patent can impose the same restrictions with regard to unpatented articles used in connection with the patented article, or produced by the use of the patented article, as could be imposed upon the patented article itself.

The cases of the *National Harrow Co.* are not authority for the Government's contention in this case. In those cases the owners of certain patents combined to transfer their patents to a corporation under an agreement that the corporation would license them to use their own patents, and the combination was to extend beyond the life of the patent. These cases

are similar to the case of *Blount Mfg. Co. vs. Yale & Towne Mfg. Co.* heretofore distinguished.

The Government Has Failed to Prove the Allegations of the Petition and Has Utterly Failed to Make Out a Case.

Judge GOFF in his dissenting opinion said (v. A, p. 125):

> "I cannot assent to the conclusion reached by the court in this opinion. The facts established by the testimony, considered in the light of the law applicable thereto, compel me to conclude that the allegations of the petition have not been sustained."

All of the defendants answered the petition under oath, the petitioner not having waived the requirement of an answer under oath. The answer of each defendant, therefore, is to be taken as equal to the evidence of one witness which must be overcome by the testimony of two witnessss or one witness and corroborating circumstances.

Jacobs vs. Van Sickle, 127 F., 62.
Calivada C. Co. vs. Hays, 119 F., 202.
Savings & Loan Co. vs. Davidson, 97 F., 696.
Street's Fed. Eq. Pr. v. 2 p., 964 *et seq.*

Furthermore, the witness Wayman and each of the defendants have denied categorically each and every of the allegations of the petition alleging any relationship between Wayman and any of the defendants, or between the defendants, except as expressed in the License Agreements, and the written contracts in evidence relating to the purchase by him of the patents.

They stated in respect to every allegation of the petition, in the most specific and definite manner, that those allegations are untrue (v. III., pp. 444, 451, 458, 467, 477, 488, 494, 507, 510, 522, 479, 485-487, 495-497, 508, 509, 517, 518, 523, 524; v. IV., pp. 5, 6-8, 15, 16, 17-19, 194, 219).

They have denied that any defendant had anything to do with suggesting the procurement by Wayman of the Arrott, Ditheridge or Lindsay patents, or any other patents (v. IV., pp. 6, 17, 132, 133, 151; v. III., pp. 477, 485, 494, 507).

Mr. Wayman has denied that any defendant aided or as-

sisted him, financially or otherwise, in the purchase of those patents (v. IV., p. 152).

Mr. Wayman and the other defendants have denied that any manufacturer ever suggested the idea to Mr. Wayman to get up the License Agreements (v. IV., pp. 6, 17, 132, 151; v. III., pp. 494, 507).

Mr. Wayman and the other defendants have denied that the Sanitary Enameled Ware Association, or any of its members, or any of its committees, ever suggested to Mr. Wayman or threw out any hint to Mr. Wayman that he do anything toward acquiring these patents, or that he take any steps toward bringing about the licenses which he afterwards granted (v. IV., pp. 6, 17, 132, 133, 152; v. III., pp. 485, 494).

Mr. Wayman and the other defendants have asserted that the idea, that the conception, that the plan, was Mr. Wayman's own from the start (v. III., pp. 494, 507; v. IV., pp. 6, 17, 132, 133, 151, 152).

Mr. Wayman has denied that anyone had any interest, in any way, shape, form or manner, in any money which he might make out of the exploitation of these patents (v. IV., p. 133).

Mr. Wayman has asserted that no one has any right to any participation, in any way, shape, form or manner, to any of the rebates, penalties or other funds, however coming into his hands, by reason of the existence of these licenses (v. IV., pp. 205, 206, 218).

Mr. Wayman has testified that all the expenses attendant upon the acquisition of the patents, the inducing of the Licensees to take licenses, the preparation of the licenses, the jobber's licenses, price lists, and every other expense, were incurred by him alone, on his own account, and in the expectation that he would make money out of the exploiting of these patents through the License Agreements (v. IV., pp. 133, 206).

Mr. Wayman and the other defendants have denied the allegations of the petition that Mr. Wayman was an ostensible licensor, and have testified that he is the owner of the patents and granted the licenses to these defendants in good faith by reason of his ownership thereof (v. III., pp. 479, 509; v. IV., pp. 17, 194).

Mr. Wayman and the other defendants have denied that there was any agreement with any of the Licensees or any of the members of the Sanitary Enameled Ware Association to restrain, hamper or impede or block the trade or lessen competition in Sanitary Enameled Iron Ware, and Mr. Wayman has denied that he ever had any agreement to such an effect (v. IV., pp. 219, 522).

Mr. Wayman and the other defendants have denied that there was any agreement to eliminate or suppress competition, and have asserted that the License Agreements invited competition and have so testified (v. III., p. 17; v. IV., pp. 2, 17, 219, 220).

Mr. Wayman and the other defendants have denied the allegation that Mr. Wayman ever had any agreement with any defendant, or with any group of defendants, to fix the prices at which Sanitary Enameled Iron Ware should be sold, and have stated that the prices which were fixed in the License Agreements were made by Mr. Wayman, and that the manufacturers did not know the prices until they received the price book (v. III., p. 479; v. IV., pp. 19, 196, 220).

Mr. Wayman and the other defendants have denied the fixing of any of the terms of the License Agreements with any of the defendants, jointly or in groups, or with any of them together, and has asserted that they were made separately with each licensed manufacturer (v. IV., p. 220).

Mr. Wayman and the other defendants have denied that except the terms that are fixed by the License Agreements and the Jobber's License Agreement, Mr. Wayman had any agreement or understanding of any kind, sort or description with the defendants (v. IV., pp. 17, 220).

Mr. Wayman has denied that there was any agreement between the Licensees on the one hand, and himself on the other (v. IV., p. 221).

Mr. Wayman has denied that there was any other relationship existing between him and the Licensees, or any of them, other than that of Licensor of each individual licensee (v. IV., p. 221).

Mr. Wayman has denied that there is any combination or agreement between the defendants to which he is in any sense a party, or that any such agreement has ever existed (v. IV., p. 221).

Mr. Wayman has denied that there ever was any combination (v. IV., p. 221).

Mr. Wayman has denied that there is any classification of jobbers, but has asserted that under his License Agreements every manufacturer is entirely at liberty to sell to any jobber to whom he desires to sell (v. IV., p. 221).

Mr. Wayman has denied the allegation of the petition that the prices were fixed by mutual agreement (v. IV., p. 221), and has asserted that the prices were fixed by himself and that the manufacturers did not know what the prices were until they received the price book (v. IV., pp. 196, 221).

Mr. Wayman has denied that there was any information furnished by him to the manufacturers whereby they could limit their output (v. IV., p. 188).

Mr. Wayman has denied that he in any way, shape, form or manner, controlled the output or that the output was ever restricted (v. IV., pp. 188, 221, 222).

In short, every allegation of the petition purporting to show any agreement or relationship between him on the one hand, and the manufacturers on the other, or the existence of any combination among the manufacturers of Sanitary Enameled Iron Ware, has been specifically denied by Mr. Wayman and the manufacturers who testified (v. III., pp. 479, 485-487, 495-497, 508, 510, 517, 518, 522-524), and they have asserted categorically and in the most positive terms that the idea of acquiring these patents, granting licenses under them, inducing the defendants to take licenses, bringing about the taking of licenses, arranging the terms, prices and conditions, were all his work, and that none of the defendants, without his suggestion, did anything that was done.

Mr. Wayman was called by the Government and has been credited by it. He surely was not called merely to be discredited. It is familiar law that the statement of a witness binds the party calling him without a showing of some element of surprise or fraud. No such showing is attempted.

Furthermore, as above stated, each of the individual defendant has under oath categorically denied all the allegations of combination and conspiracy set forth in the petition; they have denied that they had anything to do with bringing about the licenses, and have asserted that the licenses were first suggested by Mr. Wayman, that the plan was Mr. Wayman's, and

that they merely became licensees under his licenses upon the terms stated therein.

Each of the defendants who was subpœnaed to testify by the Colwell Lead Company likewise denied all of the allegations of combinations or conspiracy, all of the facts alleged in respect thereto, and reiterated the verity of the sworn answer previously filed (Vol. III., pp. 444, 451, 458, 467, 477, 488, 494, 507, 510, 522).

If the defendants are permitted to take further testimony, they offer to disprove by the testimony of all the witnesses all of the allegations of the petition in the matters referred to, and to prove all of the denials and allegations in their sworn answers.

The License Agreements are Entirely Beneficent and Have Worked no Harm to Any One.

By their several answers all of the defendants have testified, and if permitted to testify upon the witness stand, they will swear that they entered into these licenses believing that they were for the benefit of themselves, for the benefit of the trade, the improvement of the ware, and the benefit of the consumer.

The testimony, so far as we have been able to get it, is, that the result of the licenses was the improvement of the conditions of the trade, the improvement of the quality of the ware, that the jobber made more money, that the cost to the consumer was less, that during the time the licenses were in existence (from June 1 to December 31, 1910), the business of Sanitary Enameled Iron Ware was better than ever before, that the licensed manufacturers competed in quality and endeavored to make better goods; the competition between the manufacturers and between the jobbers was as active as ever; that "seconds" disappeared from the market; that as a result jobbers had less goods returned to them, less claims made for damages and replacement, etc.; that the consumer got an honest article and what he bought and paid for; that jobbers were able to get into new territory, where they had never been able to sell before, and make a profit, and, furthermore, that no restrictions have existed since January 1, 1911 (v. IV., pp. 26-29, 30-39, 40, 42, 45, 46, 49, 50-59, 60, 61, 64, 66-69, 71-75, 77-79, 81-85, 86, 92, 93).

It is submitted that it is perfectly apparent that these license contracts are made in furtherance of the business of the parties to them; they have been unaccompanied with measures of coercion, fraud, intimidation or compulsion; they are not intended and have not been directed toward the injury of persons not parties to the contracts; they do not exclude or tend to exclude others from attempting to trade in Sanitary Enameled Iron Ware; they do not impose any burden upon other manufacturers in Sanitary Enameled Iron Ware, but they merely foster the business of the parties to them and promote the sale of the goods manufactured by them.

III.

THE COURT BELOW ERRED IN NOT GRANTING THE MOTION OF THE DEFENDANTS FOR AN ENLARGEMENT OF TIME TO TAKE TESTIMONY AND THAT THE HEARING OF THE CASE BE POSTPONED UNTIL THE TESTIMONY OF THE DEFENDANTS COULD BE COMPLETED.

A Motion was Made at the Hearing Below for the Enlargement of the Time of the Defendants to Complete Their Testimony on the Ground That They Had Been Prevented, by the Petitioner's Action in Instituting Criminal Proceedings, from Properly Presenting Their Defense.

If the defendants are permitted to give further testimony, they offer to testify, that these License Agreements are the only agreements that existed between themselves severally and Mr. Wayman, and that no agreements, other than expressed in the License Agreements, existed between themselves or between them and Mr. Wayman; that these licenses were accepted by them in the belief that by obtaining the right to use the Arrott patent they would improve the manufacture of Sanitary Enameled Iron Ware as made in their factories, or would continue to maintain its quality and improve the quality of sanitary enameled ware generally; to prove that they entered into these agreements for their own several benefit to protect their business; that there was no intimidation, fraud, coercion or compulsion of any kind exercised upon them by Mr. Wayman or by anyone to accept these licenses, and that they, in

turn, exercised no coercion, fraud, intimidation or compulsion upon anyone to accept these licenses or to enter into the Jobber's License Agreements.

As appears at various places in the record, the individuals who are defendants in this Bill have been indicted individually for the same matters, transactions and things as are complained of in the petition. The indictments were found by the Grand Jury for the Eastern District of Michigan, on the 6th of December, 1910.

The Government completed the taking of its testimony on December 22, 1910, so that at the time of the filing of the indictments most of the Government's case had been put in.

The defendant Wayman was subpœnaed as the first and chief witness by the Government, and went on the stand and testified fully, freely and frankly, and produced, for the inspection of the Government, and for admission in evidence, or admitted the genuineness of, substantially all of the Exhibits which were attached to the petition ; and in addition thereto a large number of instruments, letters and other documents which the Government deemed material to its case.

Mr. Wayman naturally did this with the expectation and understanding of himself and his associates that the Government intended to proceed with the equity suit and rely upon the decision in it of the questions of law involved. Mr. Wayman and the other defendants were entirely willing to have the Court below pass upon these questions, and accordingly facilitated the Government in every respect in the taking of its testimony.

It was claimed by the Government that the questions involved in this case had not hitherto been disposed of by a Court; though the defendants' belief is that the principles governing the questions involved here have been decided by a series of cases.

Under these circumstances the indictments were a great surprise to the defendants, because the issues involved, if open to question, are cognizable in a court of equity, and, if unsettled, should certainly first be decided in a civil tribunal.

It was believed by the defendants, and they were advised by their counsel, that answers having been made under oath in response to the subpœna constituted giving testimony

within the meaning of the immunity acts, and that accordingly the indictments had been irregularly found.

The questions thus raised were presented to the District Court in Michigan, but were ruled against the defendants by Judge DENISON. From this decision, under the Rules of Federal Practice, there was no appeal until after the trial. The trial under the conspiracy indictment took place in February, 1912, resulting in a disagreement.

In view of the warnings against the defendants testifying as witnesses, elsewhere referred to, and of the necessity of standing trial upon these indictments the individual defendants were unwilling to voluntarily appear and testify, lest by so doing they should furnish the Government with some information which might be used against them upon the said trial.

No matter how innocent a man may believe himself to be, or may be advised as a matter of law that he is, it is perfectly proper for a man to refuse to put himself in a position where what he says may tend to incriminate him if by a reasonable delay, to be granted by a court of equity, he can equally well protect himself and his property at a somewhat later date without any harm to the public.

In this case the situation was one created by the Government. The Government brought the civil suit asking for relief that would practically confiscate certain property and property rights of the defendants. While that suit is pending, and before the defendants can get it disposed of, or even present their side of the story, the Government procures the indictment of these same defendants for the same matters, transactions and things, and then says: You must go and testify in the civil suit if you will protect your property rights, because there is a Statute which permits the Attorney General to certify that in his opinion the question is of such public importance that it should be expedited. We make that certificate, and ask that the case be expedited so that we can go to trial with only the testimony put in by the Government, and such testimony as you have been able to gather without calling the individual defendants who know all the facts, and are the only persons who could possibly know all the facts, and ask that the Court pass judgment in that state of the case.

We call the Court's attention to the fact that since January 1st, 1911, out of deference to the attitude taken by the

Government, all the conditions involving any restriction of price, limitation upon the right to purchase, and all other restrictions contained in the License Agreements and the Jobber's License agreements, except payment of royalties, and as to the manufacture of "seconds," have been removed.

We submit that, under these circumstances, if the Court, upon reading the record, had any doubt as to the defenses of the defendants as set out in their answers, showing utter lack of combination and conspiracy, and only a straight license from the owner of patents to his Licensees, or any doubt as to the beneficent or reasonable character of the contracts, should have enlarged the time of the defendants to take their testimony to such date as they could freely do so without prejudice by reason of the pendency of the indictments.

We submit further that under these circumstances the Court below should have given the fullest consideration to the answers of the defendants as evidence in their behalf, while it does not appear that they were considered at all. Under the rule the sworn answers were evidence on behalf of each of the defendants, not to be overcome except by the evidence of one witness and corroborating evidence or two witnesses; but the Court below does not appear to have considered them at all.

IV.

THE COURT BELOW ERRED IN HOLDING THAT THE GOVERNMENT HAD ESTABLISHED A CASE ENTITLING IT TO AN INJUNCTION AGAINST THE DEFENDANTS.

HERBERT NOBLE,
HENRY D. ESTABROOK,
HARTWELL P. HEATH,
Of Counsel.

APPENDIX A.

Charge of the Court Upon the Trial of the Conspiracy Indictment.

GENTLEMEN OF THE JURY: After listening for two whole days to the argument of counsel with great attention, so far as I could observe, and much patience, you are approaching the end of your duties in this case. I will ask you to listen to me for a few moments, as carefully as you did to counsel, and try to bear in mind what I have to say to you on this subject. Some things were said to you by counsel, naturally, in the course of a long argument, which perhaps did not bear very directly on the real merits of this controversy. My duty of course is to call your attention to those important and controlling matters which should guide you to a right conclusion, and to state to you as briefly and as clearly as I may the principles of law which are applicable to the different phases of facts, as you may find such facts to be.

The evidence has taken such a wide range, and the arguments have followed the evidence of course, that I want to call your attention, in the first place, to the real question which you have to decide here, the ultimate question. This is a criminal case, and what you have to settle in your own minds is whether or not these defendants are to be held guilty of a crime. You are not to trouble yourselves, and you ought not to trouble yourselves, with any question relative to the civil responsibility of these defendants. More or less, as the case has gone on, has been said either directly or indirectly in your hearing about a suit in equity for an injunction. You are not to be disturbed or to be in any way influenced or affected by the question whether or not these defendants have been enjoined or should be enjoined, or are liable in damages. This is a *criminal* matter, and the sole question for you to consider is whether they are guilty of the crime charged against them. You are not to disturb your minds about the general policy of the Sherman Law, so called. You need not trouble yourselves in

trying to settle whether it is expedient or inexpedient; you are to find under this evidence, and under the law as I shall give it to you, whether these defendants are guilty of the crime charged upon them and nothing else. You are not to convict men whom you believe innocent, if you do believe them innocent, for the purpose of serving as an example to anybody at all. To allow your minds to be influenced by any such consideration, when men are on trial for a crime, would be shocking; and if anything has been said to you in the argument which would naturally lead your minds into such a channel, dismiss it from your minds.

Nor are you concerned, gentlemen of the jury, in this case with what is called in common parlance a trust. You need not enter upon the difficult economic question which is involved in the very suggestion which I am making to you. These men are not charged with being in an unlawful combination or trust; they are charged with a criminal conspiracy. So that you have only to determine whether the defendants are guilty of the crime charged against them here and not of something else. And the crime charged against them exclusively is the forming of a conspiracy to restrain trade and commerce among the several states. That is the ultimate question that you must settle; and your minds should be directed to that from now until you reach your verdict and not to any of these other lateral lines of inquiry.

Now I say I am going to call your attention to matters that ought to control your judgment on this ultimate question, and to state to you the law which you shall take from me and not from counsel. Your duty is to follow the law as I give it to you, and to find the facts as in your honest judgment, in view of what I am about to say to you, and to determine what they are, and then apply the law to those facts. If I am mistaken in that I am responsible and you are not.

Some days ago I directed the acquittal of a number of these defendants, you will remember, because there was no evidence at all from which it could even be inferred that those men had had any part in the conspiracy which the government now alleges to have been formed prior to April 8th, 1910. Three of these men whose acquittal I directed, Mr. Ahrens, Mr. Duryea and Mr. Dawes, insisted that in spite of my ruling their case should be submitted to

you. You recall that very well. They refused as I may say, to accept an acquittal at the hands of any body but a jury in this case. No other evidence has been put in to affect their case than that which was put in when I directed their acquittal, and I desire you to bear that in mind; nothing has come in to change the situation since they voluntarily submitted their rights to your consideration. The other defendants now in the case are The Barnes Manufacturing Company, The Humphryes Manufacturing Company, The L. Wolff Mfg. Company, McCrum-Howell Company, McVay & Walker, a corporation, the J. L. Mott Iron Works, the National Sanitary Manufacturing Company, the Standard Sanitary Manufacturing Company, the Union Sanitary Manufacturing Company, A. Weiskittle Sons Company, a corporation, and the Wheeling Enameled Iron Company; and the other defendants, besides those three I mentioned, individual defendants are, Torrance, Barnes, Gates, Borden, Weiskittle, McCrum, Hoelcher and Wright.

You heard me say at the close of the government's case, what I thought about the sufficiency of the evidence to convict any of these people but that I deemed it my duty to submit the matter to you. Now I am submitting it to you absolutely. You must decide on the facts under the law as I give it to you, uninfluenced by any views of mine, whether these men and these concerns are guilty or not. Your recollection of the testimony, your judgment as to the inferences which are to be drawn from it, and not my ideas as to these matters, are to govern you. I am submitting it to you, and I want you to decide it on your own consciences, and with you is the responsibility and not with me, and to pay, if you can do so, no attention to my views on the subject of the sufficiency of this evidence, as expressed the other day. I said to you that the defendants stand charged with a conspiracy to restrain interstate commerce and trade. The statute under which the indictment is brought declares this: "That every conspiracy in restraint of trade or commerce among the several states is illegal; that every person who shall engage in such conspiracy shall be deemed guilty of a misdemeanor, and on conviction thereof, shall be punished by a fine not exceeding five thousand dollars, or by imprison-

ment, not exceeding one year, or by both said punishments in the discretion of the court."

We are here on a very serious matter, gentlemen, which deserves your very careful and most candid consideration. There are four counts in this indictment, and on each of them the sentence which the statute defines may be imposed. You can readily see this is a matter of great importance to all these defendants.

I say the indictment is in four counts or paragraphs. The counts allege a purpose to restrain the interstate trade of the manufacturers—two of them do—two of them allege a purpose to restrain the trade of the jobbers of plumbing supplies. In each count it is alleged the defendants sought to work out this conspiracy claimed by means of fixing non-competitive prices, and greatly increased the prices on enameled ware, fixing discounts, selling enameled ware at these prices, and under non-competitive conditions, and of refusing to sell to jobbers who did not come into the arrangement. In the count with reference to jobbers it is further alleged in substance that it was sought to get all the independents in, all independent manufacturers, and to prevent jobbers from buying ware from any except licensed manufacturers. In two of the counts, one each, that is, the first and third, one as to the manufacturers and one as to the jobbers, there is the further averment which has turned out to be of such importance in this case: That the license agreements were a device or subterfuge or cloak for concealing the illegality, as it is claimed, of this arrangement. Now, under an indictment containing different counts where several defendants are involved as in this case, varying results may be reached of course, according as the jury may determine. You may convict all or you may convict some; you may acquit all or you may acquit some. You may find guilty under one count and not under another, or you may find generally guilty or innocent under all the counts, and lest I forget further to mention that, I mention it now in speaking of the indictment.

A good deal has been said to you of course about a conspiracy and what it is. Now, for the purposes of this case, you may take this as the proper definition: A conspiracy is an agreement or a combination of two or more persons to ac-

complish by concerted action a criminal purpose. There must be concert of action ; there must of course be two or more to make a conspiracy ; one man can't conspire by himself ; and the object of the arrangement must be criminal. Under the law of the United States, which in that regard is undoubtedly beneficent, no one is punishable for a conspiracy unless, after the formation of it, some act is done by one or more of the conspirators for the purpose of carrying out the object of the conspiracy. Merely to make an agreement for a criminal purpose, if nothing is done under it, is not punishable under the laws of the United States, however it may be under the laws of some less benign jurisdictions. Something must be done to effectuate or to carry out the illegal criminal purpose before a man can be punished, and that act is called, if it is done, an overt or open act. You have heard a good deal here in discussion by counsel about overt acts. Well, that is what it means. It is simple enough when you get down to it. You have got to do something to carry out your evil purpose, if you have formed one, before you are punishable Now what follows from that? Until an agreement is reached or a determination is formed to do this criminal thing obviously nothing can be done to carry out the agreement. The very idea underlying the statute necessitates the formation of the agreement before something can be done to carry it out. In other words, the agreement or criminal combination or meeting of minds must have taken place before the act to effectuate it can possibly be performed. You must have your conspiracy, in other words, before you can have, in the nature of things, your overt act. Now that is a very important matter, gentlemen, as applying to this case, and we are only concerned with this case. Under this indictment which avers that the overt act, the act to effectuate the alleged unlawful agreement, took place on April 8th and the defendants thereafter met at Mt. Clemens in this district. There can be no conviction of these defendants unless a conspiracy to restrain interstate trade had been entered into by them or some of them before that date. Now that at once takes out of the case as an element of the crime, what under another indictment you might think was of very great importance, namely, the agreements which were signed on May 6th in New York. The fact, if you conclude that it is a fact, that you should in another

case conclude even that it were a fact, that those agreements signed in New York on the 6th of May, what are called the license and jobbers' agreement were unlawful, would not warrant a conviction under this indictment, unless you further found that a definite agreement of the minds in an unlawful purpose had been made prior to April 8th.

Now something was said yesterday, probably inadvertently, that this consideration was technical. It is anything but technical, gentlemen. Do not be deceived for an instant about that. A person charged with crime in this court must be convicted if at all, under the indictment and not under some other indictment. You need not dwell on that; you are intelligent men; you know the law as well as I do in regard to that; everybody knows the law in regard to that; for one of the safeguards, thank God, our system throws around people charged with crime is that they have got to be convicted if at all of the crime they are charged with and not of some other crime. Now in this situation, and I have tried to use very simple words in explaining these preliminaries to you, what are the claims of the parties here?

The claim of the United States is and must necessarily be, as I have just explained, that prior to April 8th, 1910, these defendants or some of them, entered into a definite agreement; that their minds met as we may say: that this agreement was unlawful and in restraint of interstate trade because its purpose was to fix prices and to do away with competition, and because the license to use the patent dredgers was simply a cover, a device or subterfuge; that what was done at Mt. Clemens was done to effectuate or carry out this unlawful purpose which had been reached; in other words, was an overt act, as I have explained to you, and that the question of intent, of conscious criminal purpose has no place in this case. That in brief is the contention of the United States. And on the part of the defendants the contention is precisely the opposite. The defendants claim that no definite agreement at all was reached prior to April 8th; that the agreement reached and signed on May 6th was a lawful agreement which might properly be made, in view of the patents, or the license to use them, that what was done at Mt. Clemens was not an overt act, was not an act to effectuate an existing agreement, but was something done in

the formation and as a step towards the settlement of the terms of an agreement which afterwards was entered into in New York on May 6th. Lastly, their claim is that whenever these agreements were made that the defendants were not actuated by any criminal purpose or evil intent.

Now under the indictments and the evidence, four matters ought to be considered by you, as you will see from what I have just stated, and your conclusions on which ought to determine your final conclusion as to the ultimate question of guilt or innocence. Let me state them to you. I think I can best aid you to reach a just result in this case by stating the matter as I am about to state it; it is the orderly and logical way in which you should reach the ultimate question. The first question which you ought to determine, which you ought to take up and settle, therefore, is this: Was any agreement actually formed by the defendants or by any two or more of them prior to April 8th, 1910?

The second question is this: Was what was discussed and done after April 8th at Mt. Clemens something done to effectuate and carry out an existing agreement or something which was a step towards the reaching of the agreement contained in the papers or evidenced in the papers and signed on the 5th or 6th of May in New York?

The third question is this: If there was any agreement formed, as alleged by the United States, was it an unlawful agreement?

And the fourth question is, whether there was any criminal intent present in the minds of the defendants when they reached, if they did reach, prior to April 8th an agreement which you may conclude after the event was an unlawful agreement.

Now, to discuss these four questions in their order, as I have stated them: Was any agreement reached by these defendants or by any two or more of them prior to April 8th, 1910? In this regard, the United States relies upon the fact that certain documents were signed by some of the defendants during the month of March, and claims that from the fact of the signatures to such documents, and the other evidence in the case, you should conclude that prior to April 8th the minds of the defendants, or some of them, had actually met in the agreement formed for the

purpose of restraining interstate commerce by the means I have spoken of.

The defendants on the other hand claim that these documents simply were tentative or preliminary and that no agreement was reached at all by any of the defendants prior to the Mt. Clemens meeting.

Now, gentlemen, mere discussion or tentative arrangements are not enough to warrant you in finding that the minds of the defendants or some of them had met prior to April 8th in any unlawful agreement. In order to find that such an agreement or meeting of minds had taken place there must have been some definite decision on their part to do something unlawful and an agreement must have been reached which contained the element of illegality. Mere discussion or negotiations leading up to the agreements of May 6th are not enough to constitute the formation of an unlawful agreement prior to April 8th. There must have been something more than consideration and negotiation to warrant you in finding that a definite agreement or meeting of minds had taken place, whether it was lawful or unlawful, prior to April 8th. As I have stated the existence of the agreement of May 6th is of itself not enough to warrant any conviction of these defendants. Those agreements as well as much of the testimony which has been let in, has been admitted for the purpose of throwing light, if it does throw light, on the question whether if the minds of the defendants or some of them had definitely met on any proposition prior to April 8, that agreement was unlawful. That is why a great deal of this evidence has been let in : To throw light, if it does throw light, on whether or not an agreement, if there was one reached prior to April 8th, was in your judgment and under the charge I am about to give to you, an unlawful agreement and for no other purpose. Now you must bear in mind several matters in disposing of these very important questions in this case.

What elements in the arrangement ultimately reached are they which the United States insist are unlawful ? No claim is made finally in the arguments that it was unlawful to license the defendants to use the patent dredger. No such claim could be made. A man who owns a patent may make a license or an agreement to let you or anybody use it. That is not the

point the government is making here. The point which it makes is that the fixing of prices and the attempts to restrain in some other way competition, that is the vice which is unlawful.

Now, what was under discussion at Mt. Clemens? what did these people go there for? The testimony on all this is perfectly undisputed; they went there to discuss the question of prices and discounts and terms of sale. There is no dispute about that in the evidence. The very thing which the government alleges their minds had met upon in an unlawful way prior to April 8th. This agreement which is talked about as the basis of the claim that a definite unlawful agreement had been made has been read to you so often I do not know as I need to dwell upon it at much length, and the testimony is entirely undisputed. A meeting was had of some of these men, four or five of them, in Chicago, to discuss this general question of the license agreement which had been under consideration in February, on the 2d of March; and, as the testimony shows, and it is not disputed, no progress had been made at that meeting, and the men had gone away, and that night Mr. Wayman drafted or outlined this agreement, which is called the March 3d agreement, and the next day had it typewritten and took it to Mr. Hoelscher to get him to sign it, and then took it to others. He testified it was purely a preliminary agreement, and an attempt to get something done, as he said, to get something started along the line they had been talking about. There is no dispute about that. Nor is there any dispute that he said to all the men who signed it that it was only tentative, and was with a view of getting the matter in shape, and to one of the men he wrote a letter to that effect, at his request. And what is the agreement? He did not sign it; but it is an agreement they would execute with Wayman as licensor; an agreement for the manufacture of enameled ware under the following United States Letters Patent, various patents covering pneumatic dredgers, to be enumerated in detail, and such additional patents as may come into his possession, and certain agreements as to terms and conditions as to selling prices of the licensed ware were to be established by a price committee, and resale prices to the jobber were to be figured in a certain way, and rebates and so forth were to be figured in a certain other way, and certain

schedules which were not then adopted, and certain discounts were to be embodied. Then, having gotten some signatures to this matter, he went on and called a meeting of the Enameled Ware Manufacturers' Association in New York on the 29th of March, and there certain other documents were signed, which it is claimed by the government show a meeting of the minds had already taken place, and one of them recites that "a proposition is pending for a license agreement and a resale price for the benefit of the jobbing trade, and whereas, long time contracts are a menace to such proposition, we the undersigned manufacturers of enameled ware hereby agree, etc." which said agreement was referred to a special committee of five. The testimony of Mr. Wayman is not disputed. There is no dispute about it. The documents almost speak for themselves, but it is for you to say whether you can find upon this evidence that prior to April 8th, when this committee met at Mt. Clemens and began to discuss these elements which the government insists are unlawful, whether they had met in any unlawful agreement prior to that time. Now I did not understand counsel in the opening of his case to take this position, but whether I understood him correctly or not that it is the position which the government now takes. Several of the persons who signed these agreements, if they are agreements which I have just been referring to, are not indicted here. Your attention was called to that yesterday, and I think properly. The Blairsville Enameled Ware Company, who signed on March 3rd, the agreement of March 3rd, and signed both the resolutions at New York. The Clymer Manufacturing Company who signed the resolutions in New York, and several individual defendants, several individuals who are not indicted; and whereas, the Kerner Manufacturing Company and Colwell Manufacturing Company, McVay & Walker did not sign, at least the Colwell and McVay & Walker did not sign anything, and the Kerner Manufacturing Company signed one of these resolutions. Now that it is the undisputed evidence in this case, gentlemen, and it is a very important point as bearing on the question whether the contention of the government as now made is sound. If you conclude that it is not, and that before these men went to Mt. Clemens there had been no unlawful agreement reached at all, that the whole matter was in a stage of negotiation and consideration

and debate, then it is your solemn duty to acquit these men under this indictment. On the other hand if you find that the contrary is true, in view of this evidence, then you should go on to consider other matters which I will state to you. But this lies at the very foundation of this case, and if you are not convinced beyond a reasonable doubt in view of this testimony that an agreement had been reached by these defendants or some of them prior to April 8th to restrain trade, I say, unless you are convinced beyond a reasonable doubt of that, you stop the case right there, and do not trouble yourselves with anything else in it. If you are so convinced, then you go on to consider what I shall next say to you.

The second question which I stated above, whether or not what was done at Mt. Clemens was something done to effectuate the object of an existing unlawful agreement or whether it was an attempt at or in the process of reaching an agreement embodied in the document of May 6th. If there was a conspiracy already formed, if you are convinced beyond a reasonable doubt of that and these were acts done to effectuate that conspiracy, then there was an actionable offense. But if not, as I have said, overt acts, if what was done at Mt. Clemens was only a step in the process of reaching this unlawful agreement, then it cannot be an overt act within the meaning of the law, and this court would be without jurisdiction to proceed further in the case; we have no right to be here, and the only right you and I have to pass upon this question is whether what was done in Mt. Clemens was an act done to effectuate an existing unlawful agreement or whether it was not.

Now then if you should conclude that their minds had met, or the minds of some of them had met to the extent of forming a purpose which was unlawful, unless what was done there was something other and further than negotiating about that thing, unless it was something done to effectuate the object of the conspiracy already formed, you see, you would not be at liberty to convict and this court would have no jurisdiction. Now it is not for you to speculate, it is not for me to speculate. It is nothing to us why this was brought in this district and not somewhere else. Some allusion was made to that yesterday; it is here and we have got to treat it as it is, and treat it honestly and fairly and not speculate as to motive; it is

nothing to us; and I say to you again, if you are not satisfied these acts done in this district were done to carry out and effectuate the purpose of an existing unlawful agreement, you must acquit; stop there.

Now the third question, passing this, and I hope I have made myself clear on that, is whether the agreement, if there was one, was an unlawful agreement. Now from the beginning to the end of this matter, so far as these papers go, and we have nothing but the papers and Mr. Wayman's testimony to go by on this subject, the scheme embodied the license to use patented dredgers in making enameled iron ware. There is no dispute about that. There cannot be under these documents. It is claimed here that the sole purpose of this arrangement,—claimed by the government—was to fix prices and to interfere with proper competition. It is for you to say, if you come to this question, whether that is true or not, but you will bear in mind—you cannot help it—that from the beginning of the whole negotiations the testimony shows, beginning one or two years before, the question of getting rights under these patents had been in the minds of some or all of these men. And one avowed purpose of all the documents, so far as they can be said to be agreements at all, was to license the use of these patented dredgers.

Now a very large part of the testimony, I think most of it, has been directed towards matters in this connection which may or may not aid you in reaching a conclusion; if you reach this branch of the case at all; I let it in in the hope if you did come to it, it might help you but yet there has been so much of it I do not know but that it is confusing rather than helpful—that is one of the troubles of a long case, to know just where to draw the line between helpfulness and confusion. The rules of law applicable to this situation are not so very difficult; they are simple enough, and I am sure you can carry them in your minds. A restraint of trade, a restraint of competition, are not phrases which are used interchangeably under the Sherman Act. It may be difficult to know—it is difficult for a court to know, just where the line should be drawn. There is no doubt about that. And it is difficult for the jurors to follow the lines which the court cannot lay down with entire clearness; but there is no doubt that there may be some things which in

in a way may be subject to restraints of competition which do not amount to restraint of trade under the Sherman law. An agreement whose sole or whose dominant flat purpose is to control prices and restrain competition would be unlawful, especially if by it the public were injured. But on the other hand, as I say, there may be some reasonable restraint of competition amongst producers which does not amount to restraint of trade under the anti-trust law. And the agreement made by the owner of a patent to license any other person to use his patent may lawfully contain whatever the licensor or owner insists upon by way of price arrangement or discounts, or resale arrangements and is under our law monopoly. Of course we all know that. He can do what he likes with his patented property, and if he says you may use it on such and such terms, then you may use it on such terms or not at all. So the law is he may impose such restrictions as he likes on the prices of goods that are to be made under the patent. Now those two lines of cleavage are reasonably clear, and they are enough I think for the purposes of this case, without going into the involved questions which might be properly discussed; but the point is that a patent license agreement may contain terms which under the Sherman Law an agreement which was not a patent agreement might not contain lawfully.

Now the evidence here is undisputed that in the early part of 1910 this Arrott patent you have heard so much about, had been adjudicated valid by the highest court in the United States in the region in which it arose, in the state of Pennsylvania, in the Third Circuit, and you must take it, and I must take it to have been a valid patent at that time. Otherwise there is no security to property under judicial decisions. That is plain enough. The defendants in their negotiations about this matter had a right to regard it as a perfectly valid patent, a basic patent. You have heard the opinion read of the Circuit Court of Appeals of the third circuit, and that is binding on us. Now there cannot be any dispute under this proof that it is a valuable patent; I do not say how valuable; that is plain enough. Now following that the public hadn't any right to make enameled ware except with the hand dredge unless the owner of the Arrott patent chose to license them. You have heard the testimony about the infringement suit,

and so forth. There is no dispute there of any consequence. Now, then, what follows? Nobody could use that without a license, or else be subject to infringement suits and payment of damages, except the owner. Now, the claim of the government is, and I am going to state it as fairly as I can, that this license arrangement, if you find it was agreed upon, as I have said, prior to April 8th, was a mere cover or device or subterfuge or cloak to hide a present unlawful purpose and nothing else, with the purpose of stifling competition, and so forth. Now, if you are satisfied beyond a reasonable doubt that is so, in view of all this testimony, then you would be at liberty to find that the arrangement was an unlawful arrangement if you find that it had been formed before April 8th.

On the other hand, if you are not so satisfied beyond a reasonable doubt, then you can find it was an unlawful arrangement. In other words, if you are convinced—or, rather, I will put it negatively—if you are not convinced beyond a reasonable doubt that the owner of the patent, for the purpose of exploiting his patented invention, in due course made this arrangement, there is no offense committed. But if you find the sole purpose was the other one, an evil purpose to control trade and restrain it and restrict it and so on, and this was just a cover; these men did not want to use the patent, then of course it would be, I charge you, an unlawful arrangement.

I need not rehearse the evidence to you on this subject; it was rehearsed fully yesterday. And you know just as well as I do all there is to the whole matter in this regard. It was a valid patent, and it was to some extent concededly a valuable patent. The men used it when they got the right; the question is whether it was used as a subterfuge, a device, a mere cloak to hide an existing unlawful arrangement.

The next question is this: Was there a criminal intent in the minds of the defendants when they reached, if they did reach, prior to April 8th, an agreement, which agreement under the evidence you may conclude to have been an unlawful agreement. This case presents a rather singular situation by reason of the great difficulty in which business men and lawyers have been placed by the so-called Sherman Act. In general it is perfectly true that one must be held to intend

the legal consequences of his acts. We all know that. If a man does that which he ought to know the law forbids, he cannot excuse himself by saying he did not intend to break the law or that he did not know the law forbade it. But the question here is so complicated by the uncertainties of the Sherman Act, as to the exact scope of the act under which this prosecution is brought, and especially so when these agreements were made two years ago, and it is complicated by the fact that the agreement was, at least in part, a patent license agreement, if not more then at least in part, and in view of all those difficulties I charge you that the matter of intent is of great importance in this case. And we are trying this case, as I said before, on the fact and on the law and not on some other fact or different indictment. Now before you can find the defendants guilty in this case, you must find beyond a reasonable doubt they acted with a corrupt criminal intent, if they acted at all, in making this alleged unlawful agreement, and in determining that intent you should take into consideration all the circumstances surrounding their actions, such as the usefulness of the patent, if you find it to have been useful, the interest of these men in securing licenses to use it, the evidence bearing on prices which has been so much discussed here, the request of some of these defendants, or one of them, that the papers be sent to Washington at once; the sending of the papers to Washington; the testimony as to what took place afterwards when a representative of the Attorney General, which is undisputed came to New York and went over the matter, and what he said about it. You have got to take all those things into consideration, gentlemen of the jury, in order fairly to determine whether these defendants, when they made the agreement, if they did make one, that was unlawful, prior to April 8th, were actuated by a criminal purpose. They are charged here with having corruptly entered into this conspiracy—a very serious offense and the element of intent of criminal purpose under circumstances such as these—and they are peculiar circumstances—must be settled by you clearly beyond a reasonable doubt in your mind before you can convict these men. For the jury to do otherwise in a case of this kind would certainly shock the conscience, because they are not charged with civil liability here, but with corrupt, criminal conspiracy.

So you see, with reference to this last point—and it is of importance to you—I am seeking only to mention to you those matters which ought to be of controlling importance in reaching your conclusions in this case. Even if you were to find, as the government claims you ought, that an unlawful agreement had been entered into prior to April 8th, you ought not to convict these men unless you are satisfied beyond a reasonable doubt they had a criminal purpose. What is conspiracy? It is an agreement to effectuate by concerted action a criminal purpose; it is an essential element of this crime if it is a crime here, and you ought not to lose sight of it. Now let me, at the risk of being very tedious, tell you what a court ought to tell every jury, no matter who the men charged with crime are, it is one of the protections the laws of this country has wound around the defendants, and the judge is bound, whether they are men like these or whether they are the meanest and most miserable offenders, to express the law in this regard to the jury, and in this case I think I ought to do it with some emphasis: The law presumes the defendant innocent of the crime of conspiracy charged in the indictment. The law presumes these defendants innocent. This presumption is in the nature of evidence, which you must consider and weigh in determining the ultimate question of guilt or innocence. The presumption continues not only here but while you are in the jury room and until you reach the final conclusion, and the burden is on the prosecution to overcome this presumption beyond a reasonable doubt as to every essential element of this offense, and I have pointed out to you what are the essential elements of this offense, in order to reach a just conclusion. And if you are not satisfied this presumption is overcome, you must acquit, as you well know. The mere presumption of innocence, as you know, in some cases, is enough, without any evidence, to warrant a jury to acquit. Some times it is the only protection a man unjustly charged has, as you well know. What are these elements; I have stated to you an agreement definitely reached before April 8th, 1910, first. Second, were the acts in Mt. Clemens acts tending to the formation of this agreement or were they acts for the effectuation of this agreement; third, it must be an unlawful purpose whose main dominant object was to restrain

trade, the license being a mere subterfuge. Fourth, such an agreement must have been formed with criminal intent.

Now I say reasonable doubt, by that is not meant a captious or imaginary doubt ; you have sat on juries enough to know what that means ; it is a reasonable doubt as your conscience and intelligence leads you and guides you. Now if as to any of those essential elements, as I have stated, you have a reasonable doubt you ought to acquit. In other words, before you can convict you must all of you be convinced beyond a reasonable doubt there was an agreement reached before April 8th ; that the acts done at Mt. Clemens were acts done to effectuate that agreement and not in the formation of another agreement ; that the agreement as formed was an unlawful agreement, notwithstanding the patent matter ; and that it was formed with a criminal purpose. The defendants cannot be convicted on suspicion or on evidence which in your mind is reasonably doubtful or uncertain, or if in your minds the evidence is capable of different interpretation, one of which is consistent with innocence, you ought not to convict, as you ought not to in any case, and I am not laying down any law here different than governing any case, although I am emphasizing it, because I think the defendants are entitled to such consideration. The evidence on each of the essential matters spoken of must in your minds, beyond all reasonable doubt, overcome the presumption of innocence and must exclude every other hypothesis except of guilt, and if the evidence does not do that it is your duty to acquit.

Gentlemen, I hope I have made this matter plain to you. I have tried to be as brief and as clear as I could. You have listened patiently to all this long trial. Now, follow if you can what I have said and go to your room intent on following out the law as I have given it to you, work out the lines of evidence as I have presented them to you, and do justice. Follow an officer.

Appendix B.

THE DISTRICT COURT OF THE UNITED STATES,
FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION.

THE UNITED STATES OF AMERICA, Complainant, vs. STANDARD SANITARY MANUFACTURING COMPANY, ET AL., Defendants.	Nos. 5163 and 5164.

The demurrers specify nine grounds, but these may be grouped into two classes.

First, it is said that the individual defendants (except the five alleged to have met at Mount Clemens) are not shown to have done any unlawful act within this jurisdiction.

The real question underlying this objection is not open upon the demurrers. The indictments allege, in so many words, that the defendants formed the combination of the conspiracy "at and within the said Eastern District of Michigan." Under such an allegation the question whether the acts of the defendants make them subject to prosecution in this District cannot arise until the trial.

The other proposition is that no act is alleged with sufficient particularity except the making of the license contracts, and that such contracts are so *prima facie* that a reliance upon them makes the indictments bad.

Reading the entire counts which refer to those license contracts, it seems to me clear that the controlling question will be as to the character of these contracts.

If it develops that they were made in the due course of exploiting a patented invention then they were not unlawful, although they might have restrained competition; but if they were sham, and a mere subterfuge for evading the laws against

combinations, they will constitute no defense to a prosecution (Rubber Tire Wheel Co. vs. Milwaukee Rubber Works Co., 154 Fed. Rep., 358, C. C. A., 7; Indiana Manufacturing Company vs. J. I. Case Co., 154 Fed., 365, C. C. A., 7).

These indictments do not, in so many words, say that the license contract was a sham or a subterfuge, but they say that it was adopted for the purpose of carrying out an unlawful combination, or by way of preparing a pretended defense to any prosecution. I think these allegations are equivalent to saying that the license was not given and taken in good faith dealing with a patent law monopoly, but was rather a mere subterfuge, and so I think the allegation sufficient.

As to those counts which do not refer to the license contract: I think it probable that the general terms of the indictment are sufficient; but if there is any question on that point, it will do no harm to continue it until the trial, inasmuch as some counts are, as I have above concluded, sufficient, and all refer to the same transaction.

An order will be entered overruling the demurrers in both cases.

ARTHUR C. DENISON,
U. S. District Judge.
Sitting by designation.

February 9, 1911.

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Office Supreme Court, U. S.
FILED.
OCT 15 1912
JAMES H. McKENNEY,

Supreme Court of the United States.

OCTOBER TERM, 1912.

No. 554.

STANDARD SANITARY MANUFACTURING CO. ET AL.,
Appellants,

vs.

THE UNITED STATES OF AMERICA.

REPLY BRIEF ON BEHALF OF APPELLANTS.

HERBERT NOBLE,
HENRY D. ESTABROOK,
HARTWELL P. HEATH,
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Supreme Court of the United States.

OCTOBER TERM, 1912.

No. 554.

STANDARD SANITARY MANUFACTURING COMPANY ET AL.,
Appellants,

AGAINST

THE UNITED STATES OF AMERICA.

REPLY BRIEF ON BEHALF OF APPELLANTS.

The brief of the United States in this case does not take up the propositions advanced by the appellants categorically, but states the Government's position independently, and only inferentially controverts appellants' points. Accordingly, in this short reply we shall merely point out the reasons why we contend that the position taken by the Government is not sound, and shall not attempt to call attention to all the inaccuracies in the Government's brief; neither shall we enter into any competition in the use of expletives.

An examination of the brief for the United States shows that many questions of fact which the Government once considered of controlling importance and which it expended much time and money in an effort to establish, are now conceded to be substantially as contended for by the defendants, and so are sought to be shrugged aside as immaterial.

It is contended on behalf of the United Sttes that "In legal theory no distinction can be made because of differences

of degree in the utility of patented tools. Therefore, whether the Arrott dredger is an essential or only a useful tool is an immaterial question in this case" (p. 51).

The evidence shows that the Arrott invention is of very great value in the art to which it relates, and we cannot admit that its importance in the art can be brushed aside as immaterial in considering patent law enacted to subserve a broad public policy by which large ends are to be attained, and therefore to be construed so as to give effect to a wise and beneficial purpose, the moral elements of which appeal to the normal man.

Moreover, the value of the invention has its further bearing upon the question of good faith.

The wise and beneficial policy of our Government in encouraging inventions has developed the inventive genius of our people. And, equally, inventions have contributed to an immeasurable degree to the prosperty and growth of our industrial life. It is conceded that both the Sherman Act and the Patent Laws were passed to advantage the public.

In the brief on behalf of the United States it is tacitly assumed throughout the argument that the business of making and marketing enameled iron ware, prior to the license agreements here in question going into effect, was ideal from the standpoint of the public. As the testimony shows, this is just the reverse of the facts. According to the contention on behalf of the United States the effect of the Sherman Act is to impose the obligation upon merchants not to do anything resulting in any form of combination to remedy trade conditions, however much such conditions may tend by fierce competition to a spot where all business is unremunerative and even tend to its destruction; ignoring, at the same time, the effect and the harm done to the public in the depreciation in quality of goods manufactured under such conditions and the injury to the community resulting from the tendency to destroy enterprises.

We deny this principle utterly. It is not true under the great body of the common law evolved out of the experience of centuries of business dealing among business men. It is not true under the Sherman Act interpreted according to the purpose of those who framed it, argued it, and secured its passage. It is no longer true according to the decisions of

this Court, since the separate opinion of Justice BREWER in the *Northern Securities Case* receding from his position in the *Trans-Missouri Freight Association Cases* and since the decisions in the *Standard Oil* and *Tobacco Cases*. It is not true tested by any principle of right or wrong. We insist that injury to the public, as shown by the facts in every individual case, taking into consideration the situation of the parties, the needs of their business, and the dominant purpose in their minds, is the test by which the validity of an agreement among competitors is to be judged. Thus tested, the arrangement complained of, in the case at bar, violates no intendment of the Sherman Act, was beneficial to the public, as well as to the parties to it, and was attained by no prohibited or unfair methods directed against competitors, and amounted simply to trade regulation. The arrangement placed competition on a higher plane among those parties to it. The goods sold were what they purported to be. The profits to the manufacturers and jobbers arose from the elimination of the sale of defective ware, which had formerly been returned causing great loss and expense to all parties. The prices received were substantially those established by competition. The goods manufactured by the use of the invention were of a uniformly better quality. The evidence shows that it was by the use of this invention only that uniform excellence could be secured. The arrangement did not interfere with manufacturers who did not take licenses. The Court below stated that "Such concerns * * * make and sell the ware in large quantities in competition with the licensed manufacturers" (v. A., p. 118).

On page 2 of the brief filed on behalf of the United States it is stated that Judge GOFF wrote no opinion. Upon reference to the record it appears (v. A., p. 125) that he said:

> "I cannot assent to the conclusion reached by the Court in its opinion. The *facts* established by the testimony, considered in the light of the law applicable thereto, compel me to conclude that the allegations of the petition have not been sustained." (Italics ours.)

On the same page the two questions are inaccurately stated. As stated, the questions are academic because "all manufac-

turers " did not take licenses, and the conditions upon which the use of the invention was allowed applied only to the articles made by its use, and not to the articles *per se*. Similarly in the second question "all the manufacturers of an article" does not apply to this case, and further, competition was not destroyed.

On pages 17 and 25, what is stated concerning the assignments of the dredger patents to Wayman should, if material, be considered in view of the fact that the assignments were made pursuant to options acquired in December, 1909 and January, 1910, and that the written assignments were prepared in March, 1910 (v. 1, pp. 27, 32; v. 4, p. 151).

At the time the letter referred to in the brief for the United States (p. 21) was written, inquiring if the addressee had any patents which he would be willing to assign, Wayman had in mind the standardization of the articles of sanitary enameled iron ware as to design, etc., and he had acquired options on some patents for that purpose. He afterwards abandoned that idea.

What is said (pp. 21 and 22) relative to the agreement of March 3rd being silent on the question of seconds must be read in the light of the evidence which shows that the market was flooded with seconds, and that the dominant purpose of the parties was to eliminate seconds and improve the market; and it was thought that a fair minimum price would aid in the accomplishment of that purpose.

The statement (p. 23) that before the meeting of March 29th and 30th Wayman sent to each manufacturer sample copies of the proposed agreements, is in accord with the facts, and establishes the contention of the appellants that he was dealing not with an association in this matter, or on behalf of an association, but on his own behalf with any and all of the manufacturers.

What is said (p. 26) of Wayman's claim to control so large an output of enamel ware, is beside the question. His efforts were to promote the use of the invention.

What is said (p. 27) with regard to options, is inconsequential when it is remembered that an option is merely an offer which becomes immediately enforceable upon acceptance, and can be accepted and made enforceable at any time before

it is withdrawn. In this case there is no question of the offers having been withdrawn prior to their acceptance.

What is said (p. 42) as to concentrating the power of the combination against Sullwold is to be read in connection with the fact that the statement is contained in a letter (v. 2, p. 317) which shows that Sullwold had cut the price, and that Mr. Wayman's permission to his licensees was merely to meet that cut.

The quotation appearing from the majority opinion below (p. 51), to wit: "All that can be safely said is that the automatic dredgers are useful tools," omits, inadvertently of course, the sentence following which favors the appellants. The next sentence is: "By their use, all other things being equal, ware can be made more cheaply and on the whole of a somewhat better average quality."

All the evidence shows that this is a very inadequate statement of the fact. The witnesses called by the appellants testified that there was no known way by which enameled ware could be made of uniformly excellent quality, except by the use of the Arrott invention; and the two witnesses called by the Government, Lose and Cook, both admitted the advantages of the power dredger, and that the power dredger makes better ware and more of it and one of them had never used the Arrott dredger (V. 4, p. 252, fols. 1 and 4; p. 254, fol. 3; p. 255, fol. 3; p. 257, fols. 3 and 4; pp. 263, 265). The testimony is that while the ware is of uniformly better quality when made by the use of this invention, it is also made more cheaply than any other known method of making good ware.

It is said (p. 54) that one of the appellant's witnesses testified that it is *possible* to make a fair tub by the hand dredge. But how often are mere possibilities realized in practice?

It is further stated (v. A, p. 118) by the majority opinion below:

> "Moreover, if the experience of the concerns which had the right to use the patented dredger had convinced them that the ware could not without their use be made good enough and cheap enough to be sold in competi-

tion with them, it is not conceivable that they should have gone to all the trouble they did to induce those two concerns to take licenses. According to the defendants' present theory the refusal to do so was tantamount to commercial suicide. If factories without licenses could not make ware which could be sold in competition with that made by those who had licenses, the fewer who had licenses the better for those who had."

The sum and substance of this statement is, that if by the use of the Arrott invention the ware could be manufactured cheaper than by any known method, self interest would dictate that the owner should retain its exclusive use, and even at the expense of continual litigation maintain their monopoly of its use. But the testimony does not show that the ware manufactured by the use of the Arrott invention could be made cheaper or compete with the kiln-run however made. The theory of the opinion ignores utterly the quality of the ware. The testimony is uniform, that by the use of the Arrott invention good ware, ware of first class quality, could be turned out in larger amount and at less cost than by any other known method

Furthermore, the theory of the opinion ignores the fact that the trade in sanitary enameled iron ware had degenerated and was in danger of extinction, and that, in order to preserve the trade and improve what was then the bad reputation of such ware and to make the trade develop, it was necessary to manufacture and sell only good ware.

That J. M. Kohler Sons Company and Iron City Sanitary Manufacturing Company sold ware in such competition with the licensed manufacturers was due to the fact that speculative builders and irresponsible plumbers were willing, if they could get it at all cheaper, to take defective ware and palm it off on the public as first-class ware.

These, among other reasons, adequately show why the Standard Sanitary Manufacturing Company was induced by Mr. Wayman to part with the Arrott dredger. It was to its individual benefit to redeem the reputation of the ware as soon as possible. These questions have been treated more at length in our main brief, and will be elaborated on argument.

The argument in the brief (pp. 68–77) proceeds upon what we consider an erroneous theory. It assumes that the restrictions were in fact on the articles sold by the licensees of Wayman. The fact is the restrictions were placed upon the use of the invention and extended only incidentally to the product of the use as a means to protect the inventor in the use of the invention. As is argued in our main brief, the only method of protecting an inventor in many cases is by preventing the manufacture, use and sale of articles which are produced by the use of the invention, though the articles themselves are unpatented.

The cases of *Keplinger v. De Young* and *Merrill v. Yeomans* referred to (p. 75) do not support the principle to which they are cited. The first was an action for damages for the infringement of a patent, and the question was whether the defendant had knowingly used the invention. The second merely holds that a patent in which the inventor claims a process cannot be held to be a patent on the product of that process.

The contention of the brief of the United States (pp. 79–87) is in conflict with the decided cases—the *Bement Case* in this Court, the *Heaton-Peninsular Button-Fastener Case* in the Third Circuit and the *Rubber Tire Wheel Case* in the Sixth Circuit, which all hold that the Sherman Act is not applicable to patent agreements. These conclusions were reached subsequent to this Court's decisions as to murder, arson, oil, whiskey, etc., covered by State statutes passed under the police powers. Nevertheless, the majority of the Court below decided, and the Government argues here, that the Sherman Act does apply and is in the same category with the statutes passed under the police powers of the States. We submit that the question is settled otherwise and not open to argument.

The cases referred to (pp. 85–88) are not in point. The typical case relied on, namely, the *Blount Case*, was held by the Court to be only an apparent license, but in reality not a license at all. The same comment applies to the other cases.

The *Raisin Case*, the *Rubber Tire Case* and the *Thresher Case* referred to (p. 93) are in point upon the proposition that the Sherman Act does not apply to patent agreements, as well

as upon the patent law as applicable to the agreements in the case at bar, and are clearly distinguishable from the *Yale & Towne* and *Harrow cases*, for in the latter cases the Court clearly pointed out that there were no licenses at all.

The groups of cases referred to (pp. 94–95) are in point upon the question of what limitations or restrictions the owner of an invention may impose, and also upon the question of his right to fix prices and resale prices; and some of the cases are in point upon the question of the application of the Sherman Act.

It should be observed also that there is no question in this case of a combination of competing patents. The Arrott invention was a basic patent. The Ditheridge and Lindsay inventions were infringing patents, subordinate thereto (v. IV, pp. 138-360).

Motion to Enlarge the Time to Take Testimony.

The petitioner here has brought a proceeding in equity. A principle of equity jurisprudence is that he who seeks equity must do equity. It is submitted that it was a flagrant perversion of that doctrine to tie the hands of the defendants by the indictments found upon the same state of facts as existed in the case at bar and insist that the defendants should be given no opportunity to give their testimony.

While the Sherman Act provides various remedies, here the objects of the act could have been entirely satisfied by the United States applying for a preliminary injunction, enabling the Government then to prosecute its criminal cases and thereafter the defendants to take their testimony to protect their property rights. This is especially true in this case because of the information furnished to the Government by the defendant Wayman, upon which the petition was principally based.

Furthermore, the Government could have applied at any time for a preliminary injunction while taking its testimony, and if, as claimed by the Government (Brief, p. 12), the exhibits admitted to be correct by the answers would without more establish the unlawful combination, the granting of the injunction would be a mere matter of course.

We submit that the Court below erred in holding that the Government had established a case entitling it to an injunction against the defendants, and that the decree below should be reversed.

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Of Counsel.

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IN THE

Supreme Court

OF THE UNITED STATES.

STANDARD SANITARY MANUFACTURING COMPANY, *et al.*,
Plaintiffs in Error,

against

UNITED STATES OF AMERICA,
Defendants in Error.

BRIEF IN BEHALF OF THE COLWELL LEAD COMPANY and JESSE T. DURYEA, IMPLEADED WITH OTHERS, PLAINTIFFS IN ERROR.

The situation with respect to the COLWELL LEAD COMPANY and its President, JESSE T. DURYEA, is radically different from that of the other defendants and for that reason it is desired to submit a separate brief in their behalf, supplemental to the main brief of all the plaintiffs in error.

Statement of Case.

This is an appeal from the United States Circuit Court for the District of Maryland in a proceeding in equity under Section 4 of the Act of Congress,

approved July 2, 1890, commonly called the "Sherman Anti-Trust Act." The original petition was filed in the Circuit Court on July 22, 1910, by the United States. There are sixteen corporations and thirty-four individuals named as defendants. The petition is the usual one alleging the violation of the Anti-Trust Act by means of a combination under uniform patent licenses. The petition did not waive answers under oath, but required that the defendants answer under oath and the answers of the defendants, were therefor sworn to. Pending the taking of the Government's testimony, indictments were found against the defendants in the District Court of the United States for the Eastern District of Michigan for the same conspiracies and combinations set forth in the petition herein. When the defendants began to take their testimony, the individual defendants, who were sworn, were threatened by the counsel for the Government that their testimony might be used against them on the criminal case, whereupon, the defendants were unwilling to testify and answer questions in this proceeding. The defendants' counsel thereupon endeavored to secure an extension of time to take the testimony until after the criminal trial, but the Circuit Court denied the motion. An appeal from the denial of such motion was likewise taken and is now before this Court.

The special questions raised by the Colwell Lead Company are:

FIRST. The good faith and propriety or reasonableness of the acts of the Colwell Lead Company, as shown by the evidence.

SECOND. The right of the owner of an invention to grant licenses upon such conditions as may benefit or protect his own business or trade.

THIRD. The right of a person to take a license from the owner of a patent in good faith for use in his own business and for his own advantage without regard to what use license agreements may be put to by others.

FOURTH. The serious prejudice of the denial of the motion to enlarge the time for taking testimony.

These questions are raised by appropriate specifications of error.

The specifications of error which we rely upon in this brief are the following:

The Court erred:

THIRD. Because, as appears from the record in this cause, the defendant Colwell Lead Company was not engaged in interstate commerce within the meaning of the Act of Congress approved July 2, 1890, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies."

FOURTH. Because, as appears from the record in this cause, the manufacturers' license agreements and the jobbers' license agreements, and the price lists made part of said agreements, all described in the petition in this cause, were not means adopted and used by the defendants in order to carry into effect the objects and purposes of any unlawful combination in restraint of said interstate trade and commerce in violation of said Act of Congress, and said agreements and price lists were legal and the Petitioner was not entitled to an injunction enjoining the defendants and all and each of them, and their officers, agents, servants, and employers from doing anything in furtherance of said manufacturers' license agreements and job-

bers' license agreements, and from enforcing said agreements or any of the terms thereof, and from adopting and enforcing said price lists in interstate commerce in sanitary enamel iron-ware.

SEVENTH. In holding that the manufacturers' license agreements, the jobbers' license agreements, and the price lists made a part of said agreements, all described in the petition in this cause, were illegal and void.

EIGHTH. In holding that the manufacturers' license agreements, the jobbers' license agreements, and the price lists made a part of said agreements, all described in the petition in this cause, were not legal under the patent laws of the United States.

NINTH. In not holding that the manufacturers' license agreements, the jobbers' license agreements, and the price lists made a part of said agreements, all described in the petition in this cause, were legal under the patent laws of the United States.

TENTH. In holding that the defendant Wayman, as owner of the patents described in this cause, could not legally under the patent laws of the United States make with the corporate defendants the manufacturers' license agreements, the jobbers' license agreements, and establish the price lists made a part of said agreements, with regard to sanitary enamed iron-ware made by the use of the inventions covered by said patents.

TENTH. In holding that the owner of patents could not legaly under the patent laws fix the price and prescribe the terms and conditions under which the product of the use of the inventions covered by said Letters Patent could be sold.

FOURTEENTH. In holding that the agreements described in the petition in this cause were illegal and in violation of the Act of Congress approved July 2, 1890, entitled "An Act to protect trade and commerce against unlawful restraints and monoplies."

TWENTY-THIRD. In holding that price agreements pure and simple are always illegal, without regard to whether the prices fixed are reasonable or unreasonable, or whether they tend to restrain interstate trade or commerce, or to stifle competition, or whether they tend to render business more stable and enable manufacturers, jobbers and retailers to conduct business at a reasonable profit upon the reasonable expense of production, handling and sale.

TWENTY-FIFTH. In holding that the owner of patents could not legaly make contracts controlling and fixing the prices and resale prices of the product of the use of the inventions covered by the patents, though the articles made by the use of such inventions were of better quality, could be produced at less cost and under better conditions, and the prices fixed were reasonable.

TWENTY-SEVENTH. In holding that the motion of the defendants that further proceedings in this cause be postponed until the criminal proceedings pending in the District Court for the Eastern District of Michigan against these same defendants have been finaly disposed of and that the taking of testimony be reopened could not be granted.

TWENTY-EIGHT. In overruling the defendants' application for leave to take further testimony.

TWENTY-NINTH. In not holding that the petitioner was not entitled to a decree in this cause while pressing the criminal prosecution against the defendants on account of the same transactions on account of which the decree in this cause was asked.

THIRTIETH. In holding that this cause was ripe for decree in view of the fact that the petitioner was pressing the criminal prosecution against the defendants for the same transactions on account of which the decree in this cause was asked, and at the same time preventing the defendants from testifying in their own defense in this cause as to material matters by threatening if they did so to use said testimony against them at the trial of said criminal prosecution.

The Issues Under the Pleadings as to the Colwell Lead Company.

The Colwell Lead Company filed its separate answer under oath, and it will be observed from this answer that all the material allegations of the bill are in issue. We do not desire to repeat at length here the allegations of the bill, but simply to state that the burden of proof is upon the United States of America to establish the essential allegations of this bill so far as the Colwell Lead Company is concerned by competent and ample evidence. The bill sets forth in substance that the various defendants are engaged in interstate commerce; that they had meetings at which a plan was devised to take uniform licenses under certain patents which were to be transferred to one Wayman, and that under these uniform licenses prices were to be fixed to the jobbers and that the

jobbers in turn are to be under contract to resell at fixed prices and that the defendants all agreed that they would sell only to jobbers and only to such jobbers who would sign contracts agreeing to maintain prices and deal exclusively with the manufacturers. These are all essential allegations of the bill and are as stated denied.

The Colwell Lead Company, in its answer, affirmatively sets forth that *it is not engaged in interstate commerce;* that it manufactures enameled ware *solely for its own use;* that it is itself *a jobber,* rather than a manufacturer; that *it buys as much enameled ware as it makes,* for it sells in its jobbing business twice as much as the product of its enameling factory; it alleges that its business is *local and not interstate;* it alleges that *it does not sell to jobbers and never has,* and, therefore, was *never a party to any agreement* as to the prices at which goods were to be sold, and that it has never asked a jobber to enter into a resale agreement as set forth in the petition, for the reason as aforesaid; that it does not sell to jobbers; that it has no occasion to make any such request. The Colwell Lead Company further alleges that *it was using the patents in question for a long time prior to the alleged conspiracy* set forth in the bill, and that it was using the same in its factory at the times referred to in the bill, and was paying a royalty for the use thereof, and that it has continued the use of the said patents for the reason that the use thereof is essential and necessary to the Colwell Lead Company in its business; that it took a renewal of this license or a new license from Wayman for that reason and for none other; that *it was not concerned in any manner whatsoever with any of the price restrictions set forth in the license agreement* referred to in the said bill and attached thereto as an exhibit. The Colwell

Lead Company denies that it has ever entered into any agreement respecting prices, or that it has ever considered itself bound by any agreement as to prices, and alleges that its business at all times has been competitive. It denies that it has any knowledge or information concerning any agreement or understanding between the other defendants named in the said bill.

Statement of Facts.

Before referring to the particular evidence which concerns the Colwell Lead Company, it may be well to state very briefly the general situation.

Sanitary enameled iron-ware is a casting of iron covered with a white enamel and is the ordinary enamel iron-ware of commerce. The articles manufactured by the plaintiffs in error in this case consisted of bath tubs, lavatories and sinks. The ware must not be confused with the so-called enameled ware kitchen utensils as that is a different class of ware entirely. The enameled iron-ware referred to in this case is exclusively classed as plumbing supplies and it is an article that must be installed by a duly licensed plumber under the regulations of practically every State. At the times referred to in the petition there were approximately twenty concerns in the United States engaged in the manufacture of this ware. The largest of these manufacturers is the Standard Sanitary Manufacturing Company, and its production *is more than fifty per cent. of the entire output.* The product is sold largely to the plumber direct, but it is also sold to jobbing houses. Many plumbers do a large business contracting for an entire row of houses or apartments and buy their material direct from the manufacturers in carload lots. Small

plumbers, however, do not carry a line of plumbing supplies and obtain their requirements from a jobbing house in small quantity for reasons that are obvious.

The process of manufacture is very fully set forth in the brief of our learned associate, and we shall only refer to it in the briefest possible manner.

Enameled iron-ware is manufactured by casting iron in the shape desired, cleaning the casting, smoothing up any roughness, generally with a sand blast. The casting is then heated in a furnace to a red heat, a temperature of about fifteen hundred or sixteen hundred degrees Fahrenheit, is withdrawn from the furnace and sprinkled with an enamelling powder. This powder is virtually an opaque white glass in a very finely pulverized state. This powder is sprinkled on the heated casting and fuses to the surface of the iron, melting and flowing a uniform smooth white coat. In sifting the powder an appliance called a dredge is used, which is nothing more or less than a sieve. The quality of the ware produced depends on the hardness and smoothness of the glass enamel and the degree of adhesion between the enamel and the surface of the iron, and commercially the appearance of the finished article is of prime importance. The Arrott dredger superceded the hand process of applying the enamel, for the reason that by the mechanical operation of the Arrott dredge the enameling powder could be harder quality—could be applied more smoothly, more evenly and more quickly than by the hand process, and being applied more quickly the iron casting was hotter when the powder touched it so that the powder fused more firmly into the surface of the iron. The resulting product was much better in quality than

that made by the hand process. The inherent quality of the ware was much better. By the hand process there was a much larger percentage of seconds or defective ware and the enamel used was not so hard an enamel as that used with the automatic dredge. The softer enamels lost their gloss quicker and became more or less unsanitary in consequence. Of course, a good tub made by a competent workman by the hand process presented an excellent appearance—one that could not be distinguished from a similar article made by the Arrott dredge—but the enamel in the ware made by the Arrott dredge more firmly adhered to the iron—a thing which was not visible to the eye.

Now, the Colwell Lead Company in 1909, *more than a year prior to the alleged combination* set forth in the petition, entered into negotiations with the Standard Sanitary Manufacturing Company to secure a license to use the Arrott dredge and it obtained from the Standard Company its consent to use same upon the payment of a royalty of a dollar a day per furnace. At this time there was no thought on the part of the Colwell Lead Company of the granting of a uniform or any other kind of license to any other manufacturers, no suggestion that other manufacturers desired to use it, no suggestion as to any restrictions as to prices or anything of that sort. The Colwell Lead Company appreciated the advantages of the Arrott dredge and desired to use it and they applied for a license and secured it and they installed the dredge at their factory. The good faith of this transaction is not and could not be attacked.

Later, Wayman as Commissioner or Secretary of the Manufacturers' Association, observing the difficulty that existed over the production and sale of defective material and knowing that the Arrott dredge was being infringed by various manufac-

turers and that the trade was injured with the public by the defective material which was being put upon the market due to the efforts to produce ware as cheaply as the Standard could by the use of the Arrott dredge, took up the question with the Standard Company of permitting other manufacturers to take licenses. *This was months after the Colwell Lead Company had secured its license.* Wayman represented to the Standard Company that the defective material could be eliminated from the market and general business conditions improved without interference with the Standard Company's business by licensing its competitors to use the Arrott dredge under proper restrictions, and the Standard Company expressed to Wayman a willingness to permit him to try to carry out such a plan and give him an option on the patents for that purpose.

We know of no better way for an inventer to get people to use his invention then to call them together and find out what they are willing to do and to devise a uniform license which will suit the requirements of all the parties interested. However, the Colwell Lead Company knew nothing of these meetings, did not attend them, was not represented at them and at no time was the Colwell Lead Company a party to any negotiations or proceedings which Wayman had with the various manufacturers. After all the rest of the defendant manufacturers had agreed to take a license and had executed and obtained them. Wayman called upon the Colwell Lead Company and told them that their old license was revocable at will and he now had the title to the patents, and that a new license would have to be taken from him. Naturally, the Colwell Lead Company, appreciating the value of the invention and the necessity

for its use, renewed the license with Wayman, but the license it obtained from Wayman was not the same as that of the other manufacturers, and it is to be observed, as we shall point out by the evidence, that *the Colwell Lead Company was not only not engaged in interstate commerce, but that it sold only to plumbers and not to jobbers at all and that none of the price restrictions were applicable to the Colwell Lead Company, nor was it at any time in any relations whatsoever with the other defendants in this proceeding.*

The Evidence.

We desire to point out every reference to the Colwell Lead Company in the proofs offered by the Government, and to state the evidence offered by the Colwell Lead Co.

a. The Government's evidence.

It is to be observed that no single one of the witnesses called in behalf of the Government, other than Wayman, referred in any way to the Colwell Lead Company or to its officers. The witnesses, other than Wayman, were generally jobbers of plumbing supplies who had had correspondence with one or more of the other defendants relative to the jobbers' agreement, but, as before stated, *the Colwell Lead Company, being itself a jobber, and not at any time selling to other jobbers, never had occasion to deal with any of the witnesses called by the Government,* and, therefore, the absence of any reference to the Colwell Lead Company is easily explained.

Wayman's testimony shows that he was "Commissioner" of the Sanitary Ware Association, which association was a trade organization, and

which had meetings from time to time for the general benefit of the trade. The Colwell Lead Company was a member of that organization. Wayman's testimony is that he took up the question of the Arrott patents of various meetings of this association in February, March and April, 1910. *At no one of these meetings was the Colwell Lead Company present or represented.* Wayman testified as to who was present at these meetings (pp. 12-15, 17, 29), and *he does not in any instance* show that the Colwell Lead Company was present, and the affirmative testimony of Jesse T. Duryea is that he was not present at any of the meetings and that he could not have been present is obvious from the fact that he was in California during the whole of the period, as he testifies (p. 264), and, as we have stated, there was no representative of the Colwell Company present. None of the exhibits offered by the Government, being the various resolutions of the association and committees, bear the signature of the Colwell Lead Company, and the minutes of the meetings do not show that they were present, nor does the testimony of any single solitary witness.

The Colwell Lead Company in its behalf subpœnaed various other defendants and asked them the question directly whether they saw any of the representatives of the Colwell Company present at any of the meetings, or whether they discussed the matter of a license agreement with the Colwell Company, and each and every one of them denied that they ever had discussed any agreement with the Colwell Lead Company, directly or indirectly, or had ever seen any of its representatives at any of the meetings (see pp. 441-449, 493- Vol. 3; p. 14, Vol. 4).

It is true that in the various proposed agreements the name of the Colwell Company was

placed in the schedule of manufacturers entitled to preferential discounts, but there is no evidence that it was placed there with the authority of the Colwell Lead Company, and it does not appear why Wayman put the name in the list for such preferential discount. *Knowing that the Colwell Lead Company was already using these patents* under a license from the original owners from whom Wayman contemplated buying, Wayman *may have expected to continue or renew the license to the Colwell Company*, and may, therefore, have thought that he should protect persons who were already using these patents; at all events, he had no authority from the Colwell Lead Company to use its name.

The only other things which could be considered as evidence in any way would be that shown on pages 144 and 145, which the Government alleges is correspondence between Wayman and the Colwell Lead Company bearing on this subject. The first item, Exhibit 76, purports to be a letter written by the Colwell Company to Wayman in reply to a letter written by Wayman: "We will not require any preferential discount below the price made by the Standard Sanitary Manufacturing Company." This letter, in the first place, is not proven. It is not an original, but a copy, as was also the next exhibit, 77 (see statement of Mr. Grosvenor, p. 273). If this letter was really written, and if it does refer to a uniform license plan, how is it that, notwithstanding the statement of the Colwell Company that it did not require any preferential discount, there *was* a preferential discount allowed to the Colwell Company in all the proposed agreements, all of which were submitted to the various defendants subsequent to the date of the alleged letter? Bearing in mind that Wayman was commissioner of an association or or-

ganization of manufacturers, and had an option to purchase patents which the Colwell Company was using, and had been using for a considerable length of time, and bearing in mind that the letters of Wayman to which these are in answer are not in evidence, we contend that it is not proper to draw the inference that the Colwell Company is to be charged with all the matters and things which were discussed between the manufacturers as alleged by the Government, or were a party to the conspiracy which the Government seeks to establish as having been entered into at these various meetings and by virtue of these various agreements. Exhibit 77, an alleged letter of March 15th, was only a copy, not proven, and Wayman did not even testify that he received it. It is to be noted *that there was no answer to the question addressed to the witness concerning the letter; that it was a copy*, and that it was already in evidence and marked, and *no one knows whence the copy came from or who made it or whether it is correct or not.* One thing is clear, that on the face of the letter the Colwell Company did not commit themselves to anything other than it acknowledged that it received a copy of a proposed agreement from Wayman. This letter, if written at all, was written by Dr. Duryea in California. As to this, the doctor says (p. 271) that he does not recall any correspondence with Wayman; than any such letter was evidently written while he was in the West; that the letter did not refresh his recollection; that (p. 273) he was on a pleasure trip and stuffed whatever communications he received in his valise, and never looked at them, but that he simply wrote acknowledging receipt without looking at the papers he had received. Dr. Duryea does not deny having written some such letters as Exhibits 76 and 77, but said he had some letters from Wayman,

and that he answered in a general way, but that he does not recall the details of the transactions, and his admissions are not sufficient to establish the letters, the originals of which are not produced or proven, nor their absence explained.

Admitting, for the sake of argument, that Dr. Duryea wrote some such letters in the spring of 1910, but that he was not present at any of the meetings or discussions, it is not sufficient to charge him or his company with being a party to the conspiracy unless he subsequently became an active party to it, with a full knowledge of all that took place.

The only other reference to the Colwell Company is at page 44, where Wayman was asked to look at separate sheets, entitled license agreements, and asked if they were the original contracts entered into by him with the manufacturers. *This question was not answered by Wayman*, but the counsel for the Government offered various papers in evidence, Exhibits 13 to 28. In the volume of the Government's exhibits (p. 42), there is a statement with reference to these exhibits, stating that they are identical with petitioner's Exhibit 9. We called the attention of the Government to the error in this statement at the time we took the testimony of Dr. Duryea, (p. 268), pointing out that the Colwell Company's contract was not identical with the other contracts, but was different. This was conceded by the Government. The Colwell Company's contract with Wayman for a renewal of this license for the Arrot patents is not established in evidence, nor is it printed, but the testimony of Dr. Duryea, as well as that of Wayman, shows clearly that it was not the same as that of the contracts made with the other defendants (p. 164, Vol. 4; p. 272, Vol. 3).

We have then, on the Government's own case, absolutely nothing to justify the statement that the Colwell Lead Company was a party to any conspiracy, or that it entered into any agreement to maintain prices, or that it did maintain prices, or that it required jobbers to sign resale agreements, or any of the matters and things alleged by the Government to be in violation of the Sherman Act. *It does not appear that the jobber's resale agreement was ever seen by the Colwell Lead Company;* that such resale agreement is not referred to in the license agreement, and does not appear that it ever came to the Colwell's attention. Certainly it had no use for it.

b. The evidence of the Colwell Lead Company.

Now, what is the evidence in behalf of the Colwell Lead Company? We have the testimony of Dr. Duryea (pp. 265, 266, 267), corroborated by the testimony of Mr. Torrence (p. 457), and Mr. Dawes (pp. 474, 475), to the effect that in the spring of 1909 the Colwell Lead Company arranged for a license under the Arrott patent with the Standard Sanitary Manufacturing Company, who were then the owners; that the license agreement was reached on a royalty basis, and the patents installed in the Colwell Company's factory. This was long prior to the alleged conspiracy or any of the matters set forth in the Goverment's bill. We have, from the testimony of Dr. Duryea, that he was not present at any of the meetings testified to by Wayman or by any of the Government's witnesses; that he was in California during February, March and April of 1910, and knew nothing about what was going on in the way of any effort of the manufacturers to get together. He said he

received some circular letters from Wayman, stuffed them in his valise and did not read them; he was away on a pleasure trip and paid no attention to those matters. In this he is corroborated by the testimony of eight or ten defendants called in behalf of the Colwell Company, to the effect that the Colwell Lead Company was not present at any of these meetings, and that they had never discussed with the Colwell Company or any of its representatives the license arrangements of any kind or description.

The various agreements offered by the Government in the nature of preliminary agreements *do not bear the signature of the Colwell Lead Company*, nor do the records of the various meetings offered by the Government show the presence of the Colwell Company or its representative; and, as we have heretofore stated, there is nothing to contradict the testimony of Dr. Duryea that his company was not represented and had no part in or knowledge of the matters and things alleged by the Government. Dr. Duryea's testimony on the subject of these meetings is that he first heard of any of those meetings in the summer of 1910, after this suit was brought (p. 264, fol. 3). Then Dr. Duryea testifies that some time in May Wayman came to his office (p. 266, fol. 3), and that this was the first time he had any talk with him in connection with the alleged agreement (p. 266, fol. 4; p. 270, fol. 3). At that time he had a conversation with Wayman, to the effect (p. 267) that Wayman now had the alleged patents; that he was issuing licenses to manufacturers, and that it was *necessary* for the Colwell Company to have a new license; that the Colwell Company's agreement with the Standard Sanitary Manufacturing Company had ceased when Wayman took over the patents. Duryea wanted to continue the use of

the patents for the same reasons that led him to obtain the original license he had from the Standard Company a year before and he finally consummated an arrangement with Wayman. The testimony is that this arrangement was *not* similar to the license which Wayman proposed to give to the manufacturers, but that there was a considerable change made in it. Just what this change is does not appear in the record. It is true that counsel for the Government produced some paper which he referred to as Exhibit 14 and sought to have Dr. Duryea identify the document, which had not up to that point been proven by the Government, but upon objection being made, the Government withdrew its question, and the Colwell Company's contract with Wayman for a renewal of this license is not established so far as this case goes. *It does appear, however, affirmatively that it was a different contract from the contract with the other manufacturers*, and it does appear affirmatively what the reasons were which led to its being different, viz., that the Colwell Company was not a manufacturer in the sense the other manufacturers were, but that it was a jobber and that it sold direct to the consumers; that it was not concerned with any provisions or clauses relating to any prices, but that the only interest that it had in the license agreement was the use by it of the alleged patents which it had been using and manufacturing the enameled ware for its own use.

The Government's witness, Wayman, was subsequently called in behalf of the defendant Colwell Lead Company, and practically corroborated the Colwell Company's testimony. Wayman's testimony on this subject, beginning at page 163, is that he did not recall having any conversations with Dr. Duryea prior to May, 1910, when he went to see him with reference to a renewal of the

license under the alleged patents. He says (p. 163) that Dr. Duryea was not particularly interested at the time, but that later he accepted a license; that Dr. Duryea said (fol. 4) that he "did not want to get tied up in any license agreement which would prevent him from meeting local competition"; that he, Wayman, got up a special agreement *to cover that situation*. Wayman says also that he knew that the Colwell Company's business was local; that the Colwell Company was a jobber, and that Wayman offered to provide so that the Colwell Company could be free in the matter of local competition. He testified further (p. 164) that Dr. Duryea and his company *did engage in a free and open competition in business in New York* after they had taken a license from Wayman, and that he, Wayman, had a great many complaints from other people about it.

We desire to call attention further to the evidence offered by the Colwell Company in addition to that just referred to as to the character of its business; that it is local and *not interstate*. In the first place, the allegation of the Government's bill, that the Colwell Company is engaged in interstate commerce, is denied by the Colwell Company, who assert in their answer that their business is purely local; that their product is shipped from their factory in New Jersey to their warehouse in New York City and is sold locally in New York, so that the burden is on the Government to show that the Colwell Company is engaged in interstate commerce. This burden it has not met. The Colwell Company, however, has offered evidence tending to show the local character of its business, and this evidence is that of Dr. Duryea (pp. 261, 262, 263) showing that the product of the factory in New Jersey is shipped to the warehouse in New York City and to their branch

at Worcester, Mass., and is there warehoused; that the product is then sold locally; that the Colwell Company do not have agents in different places in the United States, as alleged in the bill, but sell directly from their warehouses. In this he is corroborated by the testimony of Lefferts, the manager of the enameling plant of the Colwell Lead Company, who says that the entire product is shipped to the warehouse in New York City and is not shipped to any other place (p. 157, Vol. 4); and by the general testimony of the various defendants to the effect that the Colwell Company's business is generally understood to be a local business and is not interstate commerce, testimony which is generally corroborative of the specific testimony of the Colwell Company (pp. 449, 465, 483).

On cross examination of Dr. Duryea, he did testify, in answer to counsel for the Government, that the Colwell Company shipped some goods to New Jersey and some to Connecticut, but he specifically stated (p. 280, fols. 3 and 4) that it was so shipped only after it had been sold at the warehouse, as, for instance, when a plumber comes in from Jersey City and buys a tub the Colwell Company will ship it to Jersey City for him. But such business, we respectfully submit, is not interstate commerce within the meaning of the Sherman Act.

Argument.

FIRST. THE GOOD FAITH AND REASONABLENESS OF THE ACTS OF THE COLWELL LEAD COMPANY ARE FULLY ESTABLISHED BY THE EVIDENCE.

We contend that we have established beyond any question of doubt that the Colwell Lead Company is a jobber of plumbing supplies; that it has a

warehouse in the City of New York, from which it sells locally plumbing supplies. It has a branch at Worcester, Mass., where it conducts a similar business. It sells all kinds and descriptions of plumbing supplies. It owns a small factory at Elizabeth, New Jersey, where it manufactures enamed iron-ware. It manufactures only about one-half of what it sells (pp. 278, fol. 3), and it buys enameled ware from manufacturers for sale in addition to what it manufactures itself. In the course of its manufacture, the Colwell Lead Company deemed the use of the Arrott patents of advantage to it and it arranged to take a license and install the device and use them in its factory. Now let us assume, for the sake of argument, that the Government has established its allegations with respect to the other defendants. Let us assume that in the spring of 1910 the various manufacturers engaged in the conspiracy to have these patents transferred to Wayman and license agreements issued respecting the selling prices. Now, it is clear from the evidence that the Colwell Company had nothing to do with those negotiations, and there is no reason why it should take part in such transactions for two reasons: First, it was already using the Arrott patents, and, second, it was not concerned with the price at which manufacturers sold to jobbers, for the simple reason that the Colwell Company never sold any of its product to jobbers, but, on the contrary, was in competition with the jobbing trade.

It must be borne in mind that one of the chief allegations of the conspiracy urged by the Government is that the defendants concocted a resale agreement to be signed by jobbers, upon which they could obtain goods from the manufacturers. Such a resale agreement would not be of use to the Col-

well Company, and, as a matter of fact, it never did ask any jobber to sign any such agreement, for the reason that it was useless to the Colwell Company. The fact that Wayman may have sent one or two of his circular letters to the Colwell Company is of no significance. That is not evidence of any acquiescence in the plan or scheme. It is, rather, evidence, taken in connection with the fact that the Colwell Company did not take part, that it was not interested or concerned. Now, after the agreement or conspiracy was made and the different manufacturers entered into it and signed their different contracts with Wayman and Wayman took over his patents and prepared to issue his uniform license, and did issue them to manufacturers, *it was natural that he should call upon the Colwell Lead Company and insist that they should renew their license with him.* He says he wanted the revenue from the Colwell Company, and the Colwell Company did not care who got the revenue so long as it could use the patents, and which they considered advantageous. It is in evidence and undisputed that the Colwell Company wanted a license so that it could be free to compete with other jobbers in their local business, and Wayman says that he arranged this in the form of a letter so that they would be free in that respect.

Let us assume, for the sake of argument, that the Colwell Company took a license agreement similar in form to that of the other manufacturers. Would that make the Colwell Company a party to the conspiracy alleged by the Government? None of the conditions as to the sale and resale agreements were applicable to the Colwell Company. It could not be said that they entered into such an agreement for the purpose of maintaining prices or that they did maintain prices. The inference

is that they entered into such a license agreement because they wanted to continue the use of the devices they had been using, and it was the only way in which they could continue its use. The Colwell Company was in a position where in dealing with an inventor they were obliged to accept his terms, whatever the terms might be, and so long as the Colwell Company, in accepting those terms, did not itself agree to the conditions which were not applicable to the Colwell Company, and were never enforced, and in their nature could not be enforced, any conditions which, under the circumstances existing, could not restrain commerce, ought not to, and can not, be read as a violation of the Sherman Act.

The provisions of the uniform license agreement, applying them to the case of the Colwell Company, are that the Colwell Company shall sell to jobbers only at such prices as should be fixed by the licensor, *but the Colwell Company does not and never has sold to jobbers.* The testimony is undisputed that it does not sell to jobbers; that its business is of such a character that it would never sell to jobbers; but competes with jobbers. Such a provision could not amount to a restraint of trade of the Colwell Company, and least of all could it be such an unreasonable restraint as the Supreme Court of the United States, in the recent cases, says is necessary to sustain the action of the Government. The Colwell Company's answer, which is evidence, is that it has not made a single sale to a jobber in four years. We submit that the Colwell Company might easily agree that it would not sell to a jobber for the next four years; but that would be no evidence of any restraint whatever.

We submit that the Colwell Company had a right to contract for the continuance of the use by it

of patents which it had found advantageous, and that the continuance by the Colwell Company, under any of the conditions complained of by the Government, would not amount to an unreasonable restraint in the case of the Colwell Company itself. If now the Colwell Company is enjoined in this action, it is in effect deprived of its right to continue to use the Arrott patents, a right which it unquestionably has and which it requires in order that it may manufacture successfully and economically. The Colwell Company has never construed its license from Wayman to prohibit its competing freely, and it has competed freely, as the evidence shows. An injunction prohibiting it from using the Arrott patents would work vastly more in the way of restraint of trade than anything that the Colwell Company has done.

Again, a decree against the Colwell Company is an adjudication which practicaly convicts the Colwell Company of a violation of a criminal statute. It is an adjudication that it has entered into a conspiracy in restraint of trade when, as we have pointed out, the fact is that the Colwell Company has no arrangement or understanding, expressed or implied, with any other of the defendants. It has solely exercised the right of every individual to contract for its own benefit in the use of patents which it found necessary and advantageous for its purpose long before the conspiracy claimed to have been made. Whatever may be urged in support of the alleged conspiracy of the manufacturers of sanitary enameled iron-ware, none of the allegations are applicable to the case of the Colwell Company.

It may be argued that the license contract provides for a preferential discount for the Colwell Company, and that therefore they were a party to the conspiracy. An examination shows that these

preferential discounts relate only to *sales to jobbers*. The mere fact that such a statement appears on the face of a license agreement would show the ignorance of the party who prepared the license agreement of the facts bearing upon the business of the Colwell Company. If such license agreement were drawn specially for the Colwell Company, there might be a basis for argument, but as matter of fact the license is a printed form, and as such, inapplicable clauses are not entitled to much consideration. No one who knew for one minute what the business of the Colwell Company is would have put such a preferential discount in it, for it is obviously an inapplicable provision. The Colwell Company was unfortunate, perhaps, in being obliged to deal with Wayman for a renewal of its license, but it must not be forgotten that the Colwell Company had a right to deal with the owner of the patents, whether the owner of the patents was in a conspiracy with others in the violation of the Sherman Act.

We respectfully submit that the Government has failed to establish any case against the Colwell Company, but, on the contrary the Colwell Company has shown very clearly by its evidence that it is innocent of any combination or agreement with others; that its business is so separate and distinct from the others that it is not affected by any of the provisions of the uniform license agreement; that it was not concerned in concocting such agreement, and that it had a right to take the best license that it could get *so long as that license, in its application to its own business, did not involve any unreasonable restraint in interstate commerce.*

Bearing in mind that the owner of a patent has a legal right to impose conditions upon his licensees, the Colwell Company could not be charged with the burden or the effect of conditions imposed

upon others, so long as such conditions did not unreasonably restrain any interstate commerce of the Colwell Company.

We respectfully urge this Court that, so far as the Colwell Lead Company is concerned, it is not guilty, and that the Court below erred in finding that it was.

SECOND. THE RIGHT OF THE OWNER OF AN INVENTION TO GRANT LICENSES UPON SUCH CONDITIONS AS MAY BENEFIT OR PROTECT HIS OWN BUSINESS OR TRADE.

(a) *At Common Law.*

The facts upon which we argue are so fully set forth in the main brief of the plaintiffs in error that we deem it necessary only to summarize the essential points of the evidence.

The Standard Company owned an invention of great commercial value. Any invention that reduces cost is of great commercial value, and the value of the Arrott dregde is well established and conceded by the Court below. The Standard Company sold its produce to plumbers and jobbers of plumbing supplies and its volume of business was very large compared with that of its competitors. Its competitors tried to get licenses; they infringed; infringement suits were brought and other manufacturers enjoined and new infringements devised and new suits begun. The Standard Company by reason of its leadership in the business was greatly interested in the proper development of that business in competition with porcelain and vitreous wares. It was enabled, by virtue of its Arrott process, to manufacture more cheaply and better ware than its competitors. This enabled it to properly

grade its product and destroy its defective ware, melting it up and using the material over again, and to sell to the public only such ware as would pass a proper inspection. Its competitors, however, in order to meet the Sandard Company's prices—indeed, in order to exist at all—sold everything that came out of the furnace, good, bad or indifferent, and unscrupulous, contracting plumbers would buy defective ware—ware that ought to be broken up and put into the scrap heap—and instal it in a row of apartments and sell the buildings to some unsupecting purchaser, whose subsequent complaints were certainly not encouraging to those interested in building up the trade.

This defective ware was a source of great trouble and of great injury to the trade as the evidence shows conclusively.

In this situation, Wayman proposed that the Standard Company license it competitors to use the Arrott dredge, thus enabling them to manufacture cheaply, *upon condition that defective ware be eliminated and upon such further conditions as would protect the Standard Company's business or trade.* In the license finally issued, defective ware was eliminated in all classes of ware excepting tubs, and defective or seconds tubs were required to be painted green and to have the raised letter B two inches in length cast on each leg. The page of the price list or catalogue referring to these defective tubs is interesting in view of the Government's argument in the Court below. It is as follows (omitting prices and discounts):

"Baths—Seconds (Defective)—Schedule 3
"Seconds" Baths (Defective Baths)

Shall have green painted exterior and furnished with plain legs with a raised letter 'B' 2 inches in length cast on each leg."
(Here follows price and discounts.)

"After leaving Manufacturer's Warehouse, they are not subject to return for any reason whatsoever, and the Manufacturer or Jobber shall assume no risk, guarantee or obligation in their sale. *They are not to be furnished with exterior ground smooth for decorating purposes.* The *crates shall be marked 'Seconds.'*

"Manufacturers or Jobbers *shall not affix labels of* any kind whatsoever in 'Seconds' Baths, *nor shall they either verbally or in writing agree to give any guarantee whatsoever*, nor shall they accept or execute orders for 'Seconds' Baths with the proviso that the baths are guaranteed."

It will be observed from the foregoing that a great advantage would accrue to the public from the proper grading and classification of ware and the elimination on proper regulation of ware which had been used to defraud. It is to be observed that none of these conditions, with respect to defective ware, could be considered a restraint of trade as they were really for the benefit of the public and against the interests of the manufacturers for they would require the manufacture to destroy that portion of his product which was not a good article, and certainly it was well within the power of the owner of a patent to require his licencees to grade and classify the product so that it would be a proper article of commerce. The efforts of the licensor in this respect are certainly as laudable as the efforts of the Government under the Pure Food and Drug Act.

The licenses finally issued also contained the provisions protecting the Standard Co's trade by fixing the resale price to the plumber in accordance with the Standard Co.'s price list. As we have stated before, the Standard Company, with a volume of business larger than that of the aggregate volume

of its competitors, sold largely to the plumbers as did others of the defendants. In this, as well as to jobbers, the Standard naturally always protected its prices to the plumbers, that is to say, protected its own business, and when it consented to licensing its competitors to use an invention, the Standard asserted its right to protect its own business and trade in the matter of requiring a maintenance of its prices.

A careful consideration of the recent decisions of this Court shows an unqualified approval of the common law principles relating to restraints. We know of no better statement of these principles than is to be found in the careful opinion of Mr. Justice LURTON in the case of *John D. Park & Sons* v. *Hartman*, 153 F. D., 24, quoted at great length and approved in the prevailing opinion in *Dr. Miles Medical Company* v. *John D. Park & Sons Co.*, 220 U. S., 373. Ample authority in the decisions of this Court is cited for the proposition that covenants in partial restraint and ancillary principals of contract will be upheld when the restraint imposed is necessary or proper to protect a retained business. At common law, it was unquestionably lawful for a manufacturer to make an agreement with his customers to give them a rebate if they should refuse to sell his article or other similar articles at less than a certain price.

In the *Matter of Green*, 52 F. R., p. 111, Judge JACKSON held that a contract or agreement to purchase exclusively from a certain manufacturer was not unlawful; that the promise of a rebate as an inducement for exclusive trade was not improper as other sellers of the article are left unrestrained in offering the same or greater inducements. This opinion of Judge JACKSON, who subsequently became a member of the Supreme Court of the United

States, is cited with the highest approval by this Court in *Northern Securities Co.* v. *U. S.*, 193 U. S., p. 382.

The condition imposed by the Standard Co. that its own trade should be protected was clearly such a reasonable condition as was well within the common law as ancillary to a conveyance of a use—

(b) *Under the Patent Law.*

We have to consider in this case not only the right under the common law, but also the question as to whether or not the Standard Sanitary Manufacturing Company, as *the owner of a patented tool or process of great value in the trade, could license competitors to use it upon such terms as the Standard Company deemed to be for its interest,* both for the benefit of the invention as well as of the trade generally and for the protection of its own business. To deny that the Standard had such a right is not only to deny the fundamental right at common law of the owner of property from disposing of it for his own advantage, but is also a denial of the rights secured by the Patent Laws of the United States. The general right of the owner of a patent to exclude the public or to permit a use upon any terms which he may impose is derived not alone from the common law, but from the Statute. This subject is argued at great length and with the citation of all the authorities on the subject so far as we know in the main brief of the plaintiffs in error. *So far as the public is concerned, the patented invention does not exist* for seventeen years excepting only with the owner's consent.

In the case of *Henry* v. *A. B. Dick Company*, in this Court, decided March 11, 1912, the public of course had the right to sell ink, but so far as the

public is concerned there was no mimeograph except for the consent of the A. B. Dick Company and that consent did not extend to the point of permitting the public to sell ink for use upon the mimeograph. The question whether the notice on the machine was sufficient to charge Henry as an infringer does not enter into our discussion here, nor does the question of jurisdiction depending upon whether the action was on contract or upon a violation of patent rights concern us. We are concerned, however, with the general proposition involved and decided in that case, that the public had no right whatsoever unless the Dick Company granted it under the sale of the machine. In the case at bar, the question is not what rights are granted or withheld by the license contract, but whether the grantor had any right to impose restrictions at all. The public is not harmed by reason of an exclusion from a patented invention because the public never had the right from which it was excluded. The right of exclusion is clearly a property right and even under the common law, as we have before stated, an owner may impose conditions upon vendees and sub-vendees which may accompany the transfer of any right in such property.

In the case at bar, the public have, of course, a right to buy and sell bath tubs, but they have no right to buy or sell one made by the Arrott patented dredge without the consent of the owner of the patent. If the owner of the patent has the right of absolute exclusion, then he must have the lesser right of permitting to use on terms, and if the public want an Arrot tub they must confirm with the terms and conditions.

Let us suppose, by way of illustration, that by the use of the Arrott dredge a pink enameled bath

tub could be produced, differing in no way from other enameled tubs existing only in the matter of color. Let us assume that there was no patent on the tub, but only on the tool as the Government prefers to call it. Would it be argued for a moment that the owner of the tool could not impose as a condition of license a maintenance of prices on his pink tub? The public would have no right to buy or sell or use pink tubs unless the owner of the patent gave them the right, and yet the tub is not patented. The pink tub would not exist but for the invention and the restraint imposed by the inventor does not restrain anything in which the public had a right, and, therefore, it is of no public interest whether such restraint is reasonable or unreasonable. The Arrott tub instead of being pink is inherently better than any other tub on the market. The license in question marked and labeled tub as being a superior article made by the Arrott patent, and it was this article inherently different and better in which the public had no right without the consent of the owner of the patent and which was therefore subject to restraint under the patent law as well as under the principals of common law, the restraint being, as we have heretofore argued, for the benefit of the business of the party who had the sole property right of the invention to dispose of.

In *United States* v. *American Bell Telephone Company*, 167 U. S., at p. 249, the question raised was to the continuance of the telephone monopoly by successive patents. The earlier patents had expired, but later ones had not. It was the combination of the various inventions that had brought the telephone to the higest degree of public utility,

and, of course, the public insisted upon having the most serviceable telephone. This Court said:

> "Each invention has independent rights. it loses nothing because when united with another it results in an instrument more valuable than either alone will give. Suppose that at the expiration of this Berliner patent some new invention shall be made by which, in connection with those already free to the public, an instrument can be manufactured far surpassing in utility that used to-day, and the Bell Company shall purchase that invention, the public, which always insists on having the best and most serviceable, will undoubtedly take the new instrument, and in that way it may happen that what is called the telephone monopoly is practically still further continued. But surely that does not abridge the legal rights of anyone. The inventor of the latest edition is entitled to full protection, and if the telephone company buys that invention it is entitled to all the rights which the inventor had * * * Counsel seems to argue that one who has made an invention and thereupon applies or a patent therefor occupies, as it were, the position of a quasi-trustee for the public; that he is under a sort of moral obligation to see that the public acquires the right to the free use of that invention as soon as is conveniently possible. We dissent entirely from the throught thus urged. The inventor is one who has discovered something of value. It is his absolute property. He may withhold the knowledge of it from the public, and he may insist upon all the advantages and benefits which the statutes promise to him who discloses to the public his invention."

In the case at bar, it makes no difference whether the patent is on a tool or a process or an enamel or whatever it might be, if a manufacturer could

make ware better and cheaper by its use he had a right to want it and get it if he could by contract with the owner of the patent. It makes no difference whatsoever that the licensees abandoned old methods of manufacture. They were not obliged to if they did not want to. The hand process of manufacture was available to any one who chose to use it. The fact that a large number of a large percentage of manufacturers want an improved and less expensive method, is surely not evidence of bad faith and surely the inventor or the owner of the patent has no limitation on his market. The Bell Telephone Company had the right to persuade the public to take the best and latest instrument and there was no unlawful monopoly because the public was persuaded and insisted on the best. So here. The Standard Company or Wayman could induce others to pay royalty for their invention and if their competitors took the licenses because of the utility of the invention, there is no right of public complaint. If the transaction is *bona fide*, then the inventor and his licensees have full liberty of contract, and there can be no middle ground of any partial or reasonable restraint in the use of a patented invention.

(c) *Under the Sherman Act.*

It is of course conceded that there is no conflict between the Sherman law and the rights secured by an inventor under the Patent Law. The Patent Law provides a special Constitutional grant of a right of exclusion for a term of years for a consideration as has been held repeatedly by this Court. This right clearly has not been diminished by the Sherman Act. It has been argued, however, that the patent rights must be construed or limited by the provision of the Sherman Act.

In the recent cases under the Sherman Anti-trust law the full meaning of the act is made quite clear.

We have already considered briefly the rights of an owner under the common law.

In the *Standard Oil* case (221 U. S., 1), the rule of reason is obviously nothing more or less than the appication of the common law principles to the evidence to determine the propriety or reasonableness of any restraint. The learned Chief Justice, after reviewing briefly the common law and the trend of legislation and judicial decision on the subject of restraints and monopolies, adds, that

> "there is no room for dispute that the statute was intended to formulate a rule for the regulation of interstate and foreign commerce"; that "the context manifests that the statute was drawn in the light of the existing practical conception of law of restraint of trade"; that the statute "evidenced the intent not to restrain the right to make and enforce contracts, whether resulting from combinations or otherwise, which did not unduly restrain interstate or foreign commerce, but to protect that commerce from * * * undue restraint"; that is, the contracts or acts were embraced in the provision were not expressly defined, but "undoubtedly contemplating and requiring a standard, it follows that it was intended that the standard of reason which had been applied at the common law and in this country in dealing with subjects of the character embraced by the statute was intended to be the measure used for the purpose of determining whether, in a given case, a particular act had or had not brought about the wrong against which the statute provided."

The Court below held that the license was a price agreement and that all price agreements were void under the Sherman Act—as restraint of trade. Citing the *Dr. Miles Medical Co. v. Park & Sons Co.*

as authority. The case cited holds no such proposition. The opinion merely stating that agreements having "*for their sole purpose the destruction of competition* and the fixing of prices are void"—a very different thing.

From the reasoning of the learned Chief Justice, in the Standard Oil case, it is clear that the question presented in any case of an alleged violation of the Sherman Act is a question of fact, and that it is to be determined by the effect of the acts established to have been done or about to be done upon the public as a whole. It follows that an increase of prices or a reduction of prices or a maintenance of prices at an existing level is not of itself an undue restraint of trade. It is merely an element to be considered. A reduction of prices, while ordinarily of benefit to the public, nevertheless if done pursuant to a copsiracy with the object of driving out competition is a violation of the act as was held in the Tobacco case. It naturally follows an increase of prices, while generally against the public interest, yet, if it have the purpose and effect of increasing competition, may be perfectly proper and lawful. The virtue of the act lies in the fact that competition is not diminished and, therefore, commerce is not restrained. Moreover, if the increase in price was only a reasonable restraint for the protection of the retained business of a grantor and was ancillary to the conveyance—it would clearly be valid at common law and therefor under the Sherman Act.

Upon the argument of the Tobacco case, the learned Chief Justice asked the Attorney General whether or not manufacturers should be compelled to continue a ruinous competition, a question which the Attorney General failed to answer. We submit that if by a continuance of such a competition

there results a condition whereby competition is lessened either by the driving out of the smaller concerns or by the exhaustion of the resources of the larger ones, then a situation has arisen which is identical with that which the Sherman Law is designed to prevent and what the law is designed to prevent the parties may themselves prevent by agreement or otherwise without continuing an unlawful act. The Sherman Law is clearly designed to develop the trade and commerce of the American people. Its object is to permit of those things which will develop and increase our trade and commerce and to prohibit those things which tend to diminish the activities of our citizens. A reasonable restraint in one direction, if it permits of increased activity in another, so that the business as a whole is developed, is clearly not against the policy of the Sherman Act and is, therefore, permissible.

The public's interest does not concern itself alone with the question of price. It is just as much, if not more, concerned with getting full value for its price. As the learned Chief Justice stated, one of the evils of monopoly was deterioration in quality. Congress has done much to protect people against deterioration in quality in food products, drugs and the like; undoubtedly because the public interest is thereby conserved. Any combination or agreement which prevents such a deterioration is necessarily lawful. A reasonable increase of price, calculated to and which does have the effect of promoting competition in quality and thereby the interest of the public as a whole is essentially proper. A competition in quality, and style, and variety, may in some stages of an art or business be vastly more desirable to the interests of the public than a competition in price. A protective tariff is de-

signed for the development of infant industries by permitting a higher selling price. The Sherman Act is not intended to operate against other Governmental policies but rather to be concurrent with them. An industry, which is not fully developed, is to be encouraged, and protected, and, we even go so far as to say, competition in such an industry should be reasonably restrained until the industry has an opportunity of developing and growing to the point where the public will have the benefit of a full-fledged natural competition, otherwise the industry may be destroyed almost before it is begun.

So far as the Sherman Act is concerned if we disregard the Patent Law, this Court has before it, the broad proposition as to whether or not these defendants are not doing those things which tend to the better development and growth of the business in sanitary enameled iron ware, and in a determination of this question there must be considered not merely the result of an isolated act or paragraph of an agreement, but the effect of the acts of the defendants and their designs and purposes as a whole. In the language of the Standard Oil case, the question is "whether or not the parties in good faith are endeavoring to carry out the *legitimate purposes of reasonably forwarding personal interest and developing trade*," or whether they are doing acts which are "of such a character as to give rise to the inference or presumption that they had been entered into or done with the intent to do wrong to the public."

We submit that these matters must be determined upon the evidence presented to the Court. The record in this case shows beyond question that the purpose was the elimination of seconds and the guaranteeing to the public of a dependable article

which would find favor with the public and thereby increase the trade and commerce in this class of goods. These objects can only be accomplished by uniformity of prices and such a uniformity as was provided in this case was not accomplished by any increase in price. Under such circumstances, can it be doubted that the public interest has gained more by the acts of the defendants than it could possibly have lost? This Court must deal with the question as it is to-day, not as the trade in this article may be five years from now. The Sherman Act is a continuing act. The Courts may always be appealed to if combinations become oppressive, but when they are engaged in doing those things which are for the benefit of the public they should not be enjoined.

The Court below holds that the Arrott patent is a valuable and useful invention reducing the cost of manufacture—and this counsel for the Government concedes, but claims that it is not a necessity. Such a claim may be made of any invention. Railroads are not a necessity, for people can walk, is an equally true statement, and it is doubtless true that walking is interfered with to a considerable extent by the railroads, but it does not follow that railroads should be enjoined because they interfere with walking or with the sale of "horses or automobiles. The argument of the Government is just about as sound. The man who improves an article is an inventor and the right of the inventor to use his improvement is not dependent upon any such question. The absolute necessities of life were presumably furnished in the Garden of Eden and everything that has been accomplished since is not a necessity but merely possibly an improvement. However, we do not believe that this Court is going to stand in the way of improvement or to limit the right of an inventor to

get all he fairly can out of his invention. The inventor's right is a constiutional right and it is not infringed upon by the Sherman Act, as has been repeatedly held. The right of an inventor is as we have stated not a grant but a right of exclusion. It does not follow that the inventor has the sole right of exclusion. Municipal and police authorities for instance have a right of exclusion as well as the inventor of an article, and while the inventor of a violent explosive may exclude the public from using it without his consent, it does not follow that the police regulations must allow the inventor to store it within the limits of a city. The cases cited upon the brief of our learned associate, on the right of an inventor are very complete and full and for that reason we will not take them up in detail. We will content ourselves with stating that the principles laid down in the Rubber Tire cases, the Crown Cork case, the Copygraph cases and the Phonograph cases now approved by this Court in the Dick-Henry case must be deemed to be the law on the subject of the rights of the inventor, and from these cases it is easy to adduce the proposition that an inventor may sell or dispose of his invention to one or several people; that his market for his invention is not limited; that his vendee acquires all the right of the inventor, or so much as the inventor may grant; that the owner of a patent has a right to exclude the public from the use of his invention, or as a condition of permitting them to use his invention, he may impose terms he sees fit.

There is no adjudicated case limiting the power of the inventor in this respect. The right of the owner of a patent is not limited to the patented article itself, but can extend anywhere within what may be properly described the field of the invention.

The owner of the Arrott patent having a device which would enable enameled ware to be produced cheaper and better than by any other device can impose upon his licensee any terms which he may deem to be to his benefit and advantage. That is what his patent is for. He can impose any condition which he thinks will develop or increase the demand for the article produced by his process and consequently increase the demand for his invention. It is a matter of no consequence whether the enameled tub itself is patented. If he can make the production of the enameled tub dependent upon the use of his device, it is perfectly legitimate and proper for him to do so. He can monopolize his field in any way which lies within his power, but his power is the right of exclusion.

The question was asked upon the argument below whether the owner of a patent may use his patent as a subterfuge to violate the Sherman Act. We then said and now say frankly that we do not believe that he can. The act of an inventor in excluding the public, from caprice or any other motive, is beyond question. He may impose any terms he may see fit as to the right to use his invention. If manufacturers really desire to use an invention, they must submit to whatever terms are imposed; but if a number of manufacturers do not in reality want to use an invention but agree to take licenses merely in order that they may defeat the Sherman Act, then we believe that the lack of good faith would subject the manufacturers to such injunctive relief as would protect the public, but the public's right does not extend in the least degree to a patented article or to an article produced by a patented process or any article which is exempt from the public's right. It follows, therefore, that in order that it may be found that there is a

subterfuge there must be a restraint of commerce and an article in which the public have a right, as well as the element of bad faith on the part of the manufacturers. The owner of the Arrott patent could not use his device as a means of bringing about a monopoly in lead pipe, for instance, because he has no right of exclusion relating to lead pipe; but if he uses his right of exclusion only to such articles as are produced by the use of his patent, then the public are not excluded from anything in which they have a right, and it may not be said that there is a subterfuge. We believe that the logical answer to the question is that if the inventor and his licensees are acting within the limit of the domain of the inventor, there may be no improper use of the right of exclusion.

It must be presumed that the acts of the owner of the invention were in good faith and were intended for his benefit and for the benefit of his licensees and the record is without suggestion of fact to the contrary. Every act done or agreement entered into fairly appears to have been for the mutual benefit and advantage of the licensor and his licensees. There is no one thing which the licensees agreed to do which would not benefit the licensor. The Court may not question a motive upon a mere suggestion. The opinion of a competitor who refuses to take a license is not evidence and the expressions in the letters of the various defendants and in their statements made at the time and before this suit was brought, show clearly that their object was the elimination of seconds and the use of an invention which would reduce the cost and the amount of defective produce. It would not alter the situation if an incident of the arrangement was a prevention of ruinous competition, for Wayman would have a right to prevent anything

which would interfere with his realization. The Court below could not say that the use of the Arrott patent was a mere subterfuge when every element of the agreement clearly results in a benefit to the owner of the invention.

It is very clear, however, from the adjudicated cases that the caprice or whim of the inventor within the realm of his domain is not subject to judicial review and is not evidence upon the question.

In the case at bar the acts complained of by the Government relate solely and exclusively to enameled ware and the Arrott patent is valuable and relates directly to such ware. The manufacturers wanted to use it and were infringing. The Colwell Company had already taken a license. How then can it be said that its use is a subterfuge? It does not make any difference whether the Standard Company owned the patent and transferred it to Wayman nominally, or whether Wayman was the real owner. Whatever Wayman could do the Standard could do in law practically and vice versa. The other manufacturers might not be willing to take a license to use the patent if their books would be subject to examination to determine what royalties should be paid. Practically, it may have been better for Wayman to hold the patents, but as we have stated, that is a matter of no consequence and is not a fact to be considered in the least. The owner of a patent may certainly get the people together who would be likely to use his invention and persuade them by any means in his power to adopt and use his device. It does not make any difference if the manufacturers combine and agree to do it or whether they do it singly. It is the legitimate field and domain of the invention. No inventor could persuade a manufacturer to use his device unless he can show to him some benefit to be

derived by so doing. If the benefit was the reduction in cost, the production of a better article or the limitation or reduction of defective material produced, it was all proper to be held out to the manufacturer as an inducement to use the device, and particularly proper would be any scheme which would protect and develop the business in the article to which the patent relates.

It is claimed that the resale provision in the Wayman license goes beyond the power of the patent protection. We submit that this proposition is obviously erroneous. The owner of the patent desiring to increase his royalties would monopolize the market so that all the ware produced and sold paid tribute to his inventive genius. He would therefore, shut out by every means in his power any article which could be used as a substitute for that which paid tribute to him, and it is his legitimate right to do so. If other manufacturers would not license his invention and pay him tribute, it would be well within the limits of his power to say to a jobber, "if you do not sell exclusively the superior ware made by the use of my invention, I will not let you sell it all." The Constitution of the United States directs legislation to stimulate invention and the Acts of Congress passed pursuant to the constitutional provision are acts tending to stimulate the best that is within the American people. The interest of the public generally is improvement and advancement and an invention designed to produce a superior article at a lower cost requires that the public shall, if necessary, give up some of its rights temporarily in order that its ultimate benefit and advancement may be insured. There is no act or thing established by the evidence which can be said to overcome the pre-

sumption in favor of the acts of the owner of the patent in this case.

The acts of Wayman in getting the manufacturers together were perfectly proper acts for the owner of the invention. His consulting with them as to the terms of a uniform license raises no presumption of impropriety. If the owner of an invention wanted to get all the manufacturers to use his invention, he certainly would be obliged to make his licenses uniform, and he certainly would consider the desires of his licensees as well as his own desires; and to get them together to determine what form of license would be uniformly satisfactory is rather a stroke of genius than evidence of anything that is improper. Manufacturers are naturally suspicious of one another and are desirous of getting terms or conditions better than their competitors. Therefore, the acts of Wayman in making use of meetings of the Trade Asosciation to talk to them and show his desire of treating them all alike and arranging his licenses so that they would receive protection and at the same time the patent would receive its due does not raise any presumption against the defendants. This question must, like the Sherman Act, be viewed in the "light of reason" and reason demands that the result of the acts of the defendants should be considered rather than the means by which they were brought about.

The result of the acts done by the defendants is this. The Arrott patent was used by all the manufacturers instead of by one or two. The manufacturers produced a better article and agreed not to sell defective articles to the injury of the public and the deterioration of the business, one of the evils against which the trust legislation was directed, as we have pointed out. Jobbers in enameled ware were required to deal exclusively in the

licensed ware, otherwise they could not get it at all. By this means, the public in dealing with a jobber handling licensed ware could know that it was getting a guaranteed article upon which it could rely. The public paid no more, according to the evidence, for a superior article than it had paid for a questionable product, but the advantages to the manufacturer and to the jobber were that defective goods were eliminated, but business was made uniform and the use of the article would become extended and the trade increased. We are not dreaming. We are stating the evidence that is shown in the record and it is the only conclusion that could be drawn. There is no evidence in the record that any increase in price was contemplated or threatened, and more particularly, there is no evidence that anything was done by any one of the defendants which would be an unreasonable or undue restriction of commerce. In short, there is no evidence of any undue enhancement of prices made or contemplated, there is no evidence of any stifling of competition, and there *is* evidence that the acts of the defendants were directed against a deterioration of the article and for its improvement. When we say there is no evidence of a stifling of competition, we point out that the defendants by improved methods could so lower the cost of their product as to drive out the old-fashioned methods and while this might be argued as evidence, nevertheless, it is such a stifling as is due to an improvement in the art the legitimate domain of an inventor and one which works for the ultimate benefit of the public. The killing of competition which persists in the use of antiquated and old-fashioned methods is a public service and the defendants should be encouraged to render that service. However, the Sherman Act is not directed to compel pro-

ple to do things for the benefit of the public. It is only directed against preventing injury to the public.

THIRD. THE RIGHT OF A PERSON TO TAKE A LICENSE FROM THE OWNER OF A PATENT IN GOOD FAITH FOR USE IN HIS OWN BUSINESS AND FOR HIS OWN ADVANTAGE WITHOUT REGARD TO WHAT USE LICENSE AGREEMENTS MAY BE PUT TO BY OTHERS.

The Colwell Lead Company, as we have pointed out in the evidence, is a jobber of plumbing supplies and manufactures solely for its use and it sells directly to plumbers and to the public. It does not sell to other jobbers and as stated its business is strictly local.

The Colwell Lead Company took a license from the Standard Company, then the owner of record of the patents, in 1909, more than a year prior to the license agreements in question were made. It installed a dredge at its factory and used the same. It was not a party to any of Wayman's efforts to procure uniform license agreements upon conditions which should eliminate defective ware and should protect the business of the Standard Company, but after Wayman had licensed the other manufacturers he came to the Colwell Lead Company and told them they would have to renew their license with him; that the license which the Colwell Company had with the Standard Company was subject to revocation at any time, being merely an indefinite permission to use. The Colwell Company then and there told Wayman that it did not sell to jobbers, and was not concerned with any of the price restrictions in Wayman's printed form of license, in which Wayman acquiesced, and Way-

man thereupon wrote a letter or additional clause to accompany the printed form of license to adopt it to the needs of the Colwell Lead Company, and the Colwell Lead Company took a license in the form in which it could get it from Wayman and went on with the business in its usual competitive way, as the evidence shows. Had not the Colwell Company the right to contract to use the Arrott dredge by taking an agreement from Wayman for the continuance of its license? Did the Colwell Company become charged with responsibility for any agreement among manufacturers to restrain trade with jobbers? What difference did it make to the Colwell Company what price jobbers paid manufacturers or what contract other manufacturers exacted of jobbers? The Colwell Company never sold to jobbers, never contracted with a jobber, never asked a jobber to sign a contract for obvious reasons. Neither did it impose upon any jobber a condition or price at which it should sell to plumbers, nor did the Colwell Company itself make any contract or agreement respecting the price at which it should sell to plumbers. It simply continued the use of the Arrott dredge and continued to manufacture enameled ware for the use in its own business and continued to sell the same as before. When a plumber came to the Colwell Company's warerooms and asked for a complete equipment for a bathroom for a private house or for a row of apartments, the Colwell Company gave him a figure for piping, fixtures, enameled ware and all complete, and in competition with all the other jobbing houses in the vicinity. To say that the Colwell Company's business was restrained by any act or interfered with is an utter absurdity.

We contend that the Colwell Company had a perfect right to take a license in good faith for its

own use and that it makes no difference whatsoever what use was made by others of the license agreements of Waymanic.

FOURTH. THE SERIOUS PREJUDICE OF THE DENIAL OF THE MOTION TO ENLARGE THE TIME FOR TAKING TESTIMONY.

It is to be observed that upon the taking of the testimony in behalf of the defendants, the Colwell Lead Company, in an effort to substantiate the allegations of its answer and for the further purpose of showing that the alleged combination was not in unreasonable restraint of trade, subpœnaed a number of the individual defendants in the proceeding as witnesses for the purpose of establishing by abundant affirmative proof that when the advantages of the Arrott invention became known, other manufacturers began to infringe; that the Mott Iron Works infringed and were sued and enjoined; that J. M. Koehler Sons Company, Louis Lipp & Son and the Iron City Manufacturing Company were all infringing, none of them being party defendants to this suit; that the Blairsville Enameled Iron Works, not a party to this suit, applied for a license to use the Arrott dredge; that the McCrum-Howell Company, one of the defendants had considerable correspondence with the Standard Company in an effort to procure a license, all tending to show the value of the invention and the desire on the part of these defendants to use the same in good faith; that the Standard Sanitary Manufacturing Company, the owner of the patents having a large retail business direct with the plumbers, the volume of which was greater than that of all the other defendant manufacturers put together, was ap-

proached by Wayman with the proposition that the other manufacturers, its competitors, could be licensed upon such terms as would protect the Standard Company's business; that Wayman represented to the Standard Company that the infringements suits could be stopped, the rights of the owner of the patent established, defective ware driven from the market and the Standard's retail business with the plumbers fully preserved and protected, and that the option given by the Standard Company to Wayman was not only a verbal option, but a written option to enable him to carry out, if he could, the objects which he said could be accomplished.

An examination of the record will show that the witnesses so subpenaed were Max Goebel of the J. L. Mott Iron Works (Vol. 3, p. 127), Howard T. Gates and Lloyd G. McCrum of the McCrum-Howell Company (Vol. 3, pp. 136, 145), Francis J. Torrance, Theodore Ahrens, W. A. Myler and E. L. Dawes of the Standard Sanitary Manufacturing Company (Vol. 3, pp. 152, 160, 171, 5191; also Thomas Walker and Alexander C. Walker of the McVay & Walker Company (Vol. 3, pp. 181, 190). When these witnesses appeared and were sworn, counsel for the Government notified each of the witnesses that he was a defendant in a criminal proceeding in the Eastern District of Michigan; that he was under indictment in that District charged with a crime under the Laws of the United States, punishable by fine or imprisonment or both, and notified the witnesses in effect that they testified at their peril and advised the witnesses in effect not to testify.

The witness refused to testify *upon the advice of the counsel for the United States* (p. 166, Vol. 2, *et al*), and we then made an application to the Court to compel these witnesses to testify. Upon

this motion, *the counsel for the United States appeared in opposition* and argued in behalf of the witnesses that they could not be compelled to testify because there was no immunity unless the witnesses were subpœnaed by the Government, and that, therefore, the witnesses' right to avail themselves of the Constitutional privileges was absolute, and that the motion should be denied.

The evidence which these witnesses could give, they did give upon the trial of the indictments at Detroit in February and March, 1912, and we challenge the counsel for the Government to deny that such evidence was given upon the criminal trial which established the facts we have above referred to.

The effect of the action of counsel for the Government was to affirmatively take such action as to leave the Colwell Lead Company without the evidence which constitutes an absolute and complete defense to this proceeding and was an uncalled for interference unworthy of the Department of Justice of the United States of America. A motion was duly made in behalf of all the defendants, including the Colwell Lead Company for an enlargement of time to complete proofs based upon the action of the counsel for the Government as stated, and this motion was denied. This denial was error, and we believe that this Court should now remand this case to the Court below that this additional evidence may be taken. The force and effect of the evidence thus easily procurable is apparent when it is considered as we have argued that at common law the Standard Sanitary Manufacturing Company being the owner of an invention could license the use of that invention upon any terms which it deemed necessary and proper for the protection of its retail business with the plumber. The Standard

Company selling directly to the plumber did of itself protect that trade in its sales to jobbers by prohibiting the jobbers from selling at a lower price than the Standard itself maintained. When other manufacturers sought to obtain the right to use the Arrot patent, the Standard Company had an absolute right at common law to grant licenses to protect its own business with the plumber by appropriate provisions and the provisions in the license in question are purely ancillary to the license agreement and are purely such reasonable restraints for the protection of the business of the Standard as the common law permits.

The record of this case is sufficient to establish the facts, but not nearly so clearly as we would like to have them. For instance, the Government alleges in its petition that the defendants did not sell except to jobbers. This is denied under oath pursuant to the requirements of the bill and the answer under oath has the effect of evidence and there is nothing to the contrary. It appears affirmatively that the Standard Sanitary Company, the Colwell Lead Company and other of the defendants sell to plumbers, but the quantity and importance of their business in that respect is not shown. When it is considered that under the patent law the owner of an invention has a right to exclude the public from the use of his invention except upon terms, the propriety of the terms so imposed becomes of importance. If upon the evidence there is a common law right to impose the terms, regardless of the patent law, surely the right would be upon the loss in a case arising under the patent law.

FIFTH. THE COURT BELOW ERRED IN HOLDING THAT THE COLWELL LEAD COMPANY WAS ENGAGED IN INTERSTATE COMMERCE WITHIN THE MEANING OF THE SHERMAN ACT.

This question is raised by our third assignment of errors. As we have before pointed out, the Colwell Company has a wareroom in New York and one in Massachusetts. Its factory is in the suburbs of New York at Elizabethport, N. J., where is manufactures lead and iron pipe and enameled ware. This enamel ware it ships to its two warerooms and is there sold. It does not have agents to go out and sell in various States or anything of that kind, as alleged in the petition. The evidence is that it does not sell in any such manner, but that its trade is purely local in the vicinity of its warehouse. When asked if it shipped goods to New Jersey, Dr. Duryea said yes it did; that when a plumber from Jersey City came to the warehouse and bought goods and asked that they be shipped to his place of business in Jersey City, they would certainly be shipped there, but this trade, as we have before stated, is not Interstate commerce within the meaning of the Sherman Act. The goods transported from the Colwell Company's factory in New Jersey to its warerooms in New York involved no change of ownership on the part of the goods, nor was there any agreement license or otherwise affecting such transportation. It was purely the convenience of the Colwell Lead Company which led it to manufacture in New Jersey and to transport the goods from the factory to the warerooms in New York. It was a thing which was due purely to the geographical location of New York City and the economy of manufacturing in the suburbs instead of in the City itself. After the goods were in the warehouse in New York, they become the subject of sale

and any restrictions, which it may be urged were placed upon the business of the Colwell Company by the license system in question, did not become operative upon the property until it became the subject of sale.

Now, the sales by the Colwell Company were local. They were made to people who come to the warehouse, as the evidence shows without dispute. People came to the warehouse and bought and presumptively paid for the goods. The goods were shipped as per the purchaser's instructions. Some of these goods were shiped to Jersey City, but when they were shipped *they were the property of the purchaser* and not the Colwell Lead Company. No sales were made outside of New York and no contracts of sale were made outside of New York. The business was purely and simply a local business and one subject only to regulation by the Statutes of the State of New York. A seller's act in delivering merchandise to a common carrier is not any part of the Interstate transportation and does not make the goods the subject of Interstate commerce. The fact that the sale is made with a view of the goods being transported after the sale does not make the sale Interstate (*Kidd* v. *Pierson*, 128 U. S., 1; *United States* v. *E. C. Knight Co.*, 156 U. S., 1; see also *Hopkins* v. *United States*, 171 U. S., 578; *Anderson* v. *United States*, 171 U. S., 604).

Respectfully submitted,

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In the Supreme Court of the United States.

OCTOBER TERM, 1912.

STANDARD SANITARY MANUFACTURING COMPANY AND OTHERS, APPELLANTS,

v.

UNITED STATES OF AMERICA, APPELLEE.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND.

BRIEF FOR THE UNITED STATES.

WASHINGTON : GOVERNMENT PRINTING OFFICE : 1912

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In the Supreme Court of the United States.

OCTOBER TERM, 1912.

STANDARD SANITARY MANUFACTURING Company and others, appellants, *v.* UNITED STATES OF AMERICA, APPELLEE. } No. 554.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND.

BRIEF FOR THE UNITED STATES.

STATEMENT.

This is a proceeding under the Sherman antitrust law (26 Stat., 209) to put an end to an unlawful combination restraining interstate commerce in sanitary enameled ironware, such as bathtubs, washbowls, lavatories, sinks, and kindred articles indispensable to every householder who wishes to equip his home with modern plumbing conveniences.

The original petition was filed July 21, 1910, in the United States Circuit Court at Baltimore against 16 corporations and 34 individuals; the answers, in

September following. An examiner was appointed; voluminous proofs were taken; the Attorney General certified that the case was important; it was argued in June, 1911, before the two circuit judges of the third circuit, Judges Goff and Pritchard, and District Judge Rose; October 13 following the opinion of the court, by Judge Rose, was filed, one judge dissenting without opinion. The final decree enjoined all the defendants except two, as to whom the petition was dismissed.

Notwithstanding the considerable testimony taken, the case may be reduced to two questions of law:

First. May the owner of a patent on a tool used in the manufacture of an article not patented, by licensing all manufacturers of that unpatented article to use the patented tool in the process of manufacture, determine the prices and terms under which the unpatented article shall be sold by manufacturers to jobbers and wholesalers, and also fix the prices and terms of sale from the wholesaler to the retailer?

Second. May all the manufacturers of an article not patented, which they have been selling throughout the United States in competition with each other, destroy competition among themselves by entering into uniform license agreements to use in the manufacture of the unpatented article a patented tool, and by incorporating in such agreements uniform non-competitive prices and terms of sale and resale of the unpatented article?

Appellants contend that the answer to each of these questions is the affirmative. They maintain

that the patent laws vest in the patentee as rights the privileges here claimed. We aver the contrary. We assert, further, that the so-called license arrangement adopted by appellants was merely a hocus pocus, a thimble-rigging device, by which they expected to trick and bamboozle the public and the courts.

Throughout the discussion of the questions of law and fact involved in this case it is essential to keep one fact in mind, namely, that the noncompetitive prices and terms of sale and other restraints of which the Government complains relate to commerce in articles not patented. The only patents mentioned in the pleadings and evidence are patents upon tools used in the manufacture of unpatented articles. Not one of the restrictions complained of has to do with the sale and distribution of the patented tool, but they all directly relate to and restrain commerce in unpatented enamel ware in the making of which the patented tool is used.

This case presents the latest and therefore most fashionable contrivance for evading the rules prescribed by the Sherman Act in the conduct of interstate commerce, and particularly "the rule of free competition among those engaged in such commerce." (Mr. Justice Harlan in the Northern Securities case, 193 U. S., 331.) Since that act was passed in 1890 this court has had occasion to consider various forms of combinations and monopolization. The earliest form was that of an unincorporated association with a constitution and by-laws accomplishing

unlawful restraints, condemned in the Addyston Pipe case (175 U. S., 211), *Montague* v. *Lowry* (193 U. S., 38), Trans-Missouri Freight Association (166 U. S., 290), and Joint Traffic Association cases (171 U. S., 505). Destruction of competition between manufacturers through the adoption of a common selling agency given the form of a State corporation, another method of combination, was held unlawful in the Continental Wall Paper case (212 U. S., 227). The holding company as a means of suppressing competition whether between railroads or between industrial companies received the same judgment in the Northern Securities case, *supra*, and in the Standard Oil case (221 U. S., 1). In *Dr. Miles Medical Co.* v. *John D. Park & Sons* (220 U. S., 373) this court pronounced unlawful a scheme of so-called agency contracts under which a manufacturer attempted to establish uniform prices on all sales by wholesalers and retailers of proprietary medicines manufactured by him. In the case against the Tobacco Trust (221 U. S., 106) it was held that the American Tobacco Company and five other companies organized under the laws of New Jersey were unlawful combinations, among other reasons, because they had acquired monopolistic power with a wrongful purpose, and by methods inconsistent with a natural and normal expansion of business. In *United States* v. *Terminal Railroad Association et al.* (224 U. S., 383) it was decided that a terminal association of railroads is an illegal restraint so long as it does not act as the impartial agent of every line which, owing to

geographic conditions, is under compulsion to use its instrumentalities.

The case at bar is an instance of an attempt to conceal the common garden variety of an agreement fixing prices and interfering with competitors under the guise of a legitimate licensing arrangement for the use of patents. Instead of embodying the unlawful restraints in the constitution and by-laws of an association of manufacturers, the appellants incorporated those restraints into so-called "license agreements" under patents. They devised uniform contracts abounding in terms taken from the patent laws incorrectly used with the object of hoodwinking the public. Each corporation defendant entered into one of these "license agreements" with the same contracting party to whom the three patents had been transferred for that purpose just before the signing of the contracts. As each of the contracts was identical with every other contract as to prices, terms, and conditions of sale the defendants destroyed competition as effectually as they would have suppressed it if, instead of contracting with a third person, they had contracted with each other by signing the articles of an unincorporated association, or by entering into an arbitrary price agreement.

There are five volumes of record. Volume A contains the pleadings, opinion of the lower court, and assignment of errors; Volume I, Government's testimony; Volume II, Government's exhibits; Volumes III and IV, defendants' testimony and exhibits and Government's rebuttal testimony.

SUMMARY OF THE PLEADINGS.

(a) The petition.

The petition names as parties defendant 16 corporations and 34 individuals, officers of the several corporation defendants. (A, 2–5.) The factories for the manufacture by appellants of sanitary enameled ironware, such as bathtubs, washbowls, lavatories, and sinks, are located in 10 different States. (A, 5.) The defendants sell and ship these products throughout the United States and abroad. (A, 6.)

It is alleged that the defendants control 85 per cent of the total interstate and foreign trade and commerce in this ware and that they would be in active competition as to prices and other conditions of sale if they had not entered into the unlawful combination described in the petition. Six independent manufacturers, not defendants, whose names are given, are stated to comprise all outsiders. (A, 6.)

After charging the practices habitual to persons observing unlawful monopolistic agreements, viz, elimination of competition, increase of prices in sales by manufacturers to jobbers and in resales by jobbers to plumbers, uniform contracts, the holding of jobbers to fixed resale prices, mutual cooperation in fighting and concentration against independent manufacturers and outside jobbers, the imposing of penalties upon members of the combination for breach of any of the rules established, the petition proceeds to describe more specifically the manner in which the defendants attempted to disguise their unlawful

project under the mask of an ostensible licensing arrangement to use certain patents. It is this feature, namely, the form adopted, which distinguishes this combination and monopoly from those heretofore condemned by this court. The petition describes the scheme as follows:

> By the conditional assignment, for a nominal consideration, of three patents on certain tools owned and used by three of the defendants in the manufacture of some of their products of enameled ironware to defendant Edwin L. Wayman, who was selected as assignee by agreement of all the defendants, and by a system of license agreements, to manufacture and sell enameled ironware, entered into ostensibly under those patents by all the corporation defendants, and other license agreements to sell, entered into by jobbers, defendants have sought and are now seeking to accomplish, and are accomplishing, all the unlawful objects, purposes, and results hereinabove described.
>
> * * * * *
>
> As previously stated, all the defendants were and are manufacturing sanitary enameled ironware, such as bathtubs, washbowls, lavatories, drinking fountains, sinks, closets, etc., and were and are selling and shipping their products throughout the United States and abroad and so are engaged in interstate and foreign trade and commerce, and have been so engaged for many years. These products were and are manufactured under different patents and a variety of processes

by the various defendants. All of the defendants determined and agreed that three competing patents, being patents for tools called "dredger for pulverulent material," "pneumatic sieve," and "enameling powder distributor," respectively, should be assigned by three defendants, each of whom owned one patent, to defendant E. L. Wayman, each patent for a nominal consideration and subject to reassignment at the expiration of a short term on the demand of the party making the assignment to Wayman. In accordance with this agreement, the following patents were assigned to Wayman: The Arrott patent, No. 633941, by the Standard Sanitary Manufacturing Company; the Dithridge patent, No. 949625, by the J. L. Mott Iron Works; the Lindsay patent, No. 939918, by L. Wolff Manufacturing Company.

These patents and the tools they cover, while useful and valuable in the manufacture of sanitary enameled ironware, are not essential thereto. * * * The sole purpose of the assignment was that the patents might screen the real intent of the defendants and serve as a mere subterfuge and a device to evade the Sherman antitrust law.

Before the assignments were made all the defendants had agreed upon all the essential features of the licensing arrangement. They had determined upon all the principal conditions and terms of the contracts to be entered into by the manufacturers with Wayman, ostensible licensor; upon the jobber's licensing agreements; upon the resale prices at which jobbers

should sell in interstate commerce to plumbers, retailers, and consumers. They had agreed upon a price list wherein were stated all the articles of sanitary enameled ironware made by all of the defendants and in which were specified the prices at which those articles should be sold by the defendants throughout the United States and the resale prices which jobbers should observe in making sales of the same articles to their customers. In other words, this price list, arrived at by agreement and consultation between defendants and without competition between them, fixes the price which every user of sanitary enameled ironware in the United States must pay for every article manufactured by the defendants.

* * * * *

To repeat, all the terms and conditions of all the contracts and agreements which together make up the licensing arrangement had been agreed upon by all the defendants prior to the assignment of the patents to Wayman. Furthermore, each defendant stipulated as a condition to his executing the license agreement that all the others should execute a similar agreement. No defendant would have executed the agreement unless he had been certain that all the other defendants would execute it. The agreement on the part of all the defendants to enter into the license arrangement was a condition precedent to the assignment of the patents to Wayman. There would have been no such assignment to Wayman and no licensing agreement with any if all the corporation defendants had not agreed to

> go into the scheme. In fact, all the parties to the agreement were not and are not seeking the use of a valid and essential patent, necessary in the carrying on of their business, but were and are establishing and maintaining a price-fixing plan designed to eliminate all rivalry between them and deprive the public of the advantages which flow from free and unrestrained competition.

Attached to the petition were copies of the manufacturers' license agreement with Wayman (A, 24), the agreement between the manufacturer and the jobber (A, 28), and certain pages of the price list (A, 33). Other exhibits attached to the petition evidenced the manner in which the licensing arrangement was arrived at (A, 13–23) and illustrated the methods of the defendants and the effect of the combination upon independent manufacturers and jobbers who did not sign the license agreements (A, 37–42). All these exhibits to the petition were introduced and proved by the Government during the taking of testimony. Therefore they may properly be considered parts of the petition.

THE PRAYER.

1. That it be adjudged that the defendants have entered into a combination and conspiracy in restraint of interstate commerce in enameled ware and have attempted to monopolize that commerce, and that they be enjoined from doing anything in furtherance of such combination. (A, 11–12, pars. 1 and 4.)

2. That it be adjudged that the manufacturers' license agreements, the jobbers' license agreements, and the price list were planned for the purpose of enabling the defendants to carry into effect the unlawful combination, and that such agreements and price lists be declared illegal and the defendants be enjoined from observing or enforcing them in any manner. (A, 11, par. 3.)

3. That it be adjudged that the patents were acquired by Edwin L. Wayman solely to effectuate the unlawful objects of such conspiracy, and that he be enjoined from exercising any control over the interstate business of the defendants by virtue of his holding such patents. (A, 11, par. 2.)

4. That the defendants be enjoined from entering into any similar combination. (A, 12, par. 5.)

(b) The answers.

(A, 43–97.)

The defendants filed a number of answers, all verified. Edwin L. Wayman, assignee of the patents and the licensor, filed one answer; the three corporations, with their respective officers, which had assigned the patents to Wayman, joined in another answer; all the other defendants, corporate and individual, filed a third answer, the same counsel appearing for all the defendants. Subsequently the Cahill Iron Works and the Kerner Mfg. Co. and their officers withdrew their answers and filed new answers admitting the charges of the petition and consenting

to a decree. They, of course, do not appeal. The Colwell Lead Co. also withdrew its answer and filed a separate answer. This company, an appellant here, will be referred to later. (Infra p. 59.)

The answers deny specifically every allegation of the petition except that they admit that certain exhibits attached to the petition (Nos. 8, 9, and 10; A, 24–37) are generally correct copies of the manufacturers' license agreement, the jobbers' license agreement, and a part of the price list (A, 59). These exhibits whose execution is admitted by the answers would without more establish the unlawful combination. Defendants aver that each of the corporation defendants has *separately* taken a license from Edwin L. Wayman under the three patents enumerated (A, 56), which licenses are similar to the manufacturers' license agreement attached to the petition and that licensed sanitary enameled iron ware is sold by the defendants to jobbers under agreements similar to jobbers' license agreement attached to the petition.

Except as above stated, the defendants deny all the allegations of the petition.

For a further and "for a more complete answer" the defendants describe the process of enameling sanitary enameled ironware and the use therein of the dredger manufactured under the Arrott patent. Briefly stated, an enameled-iron bathtub is made by sifting over the tub, red-hot from the furnace, a powder containing most of the ingredients of glass.

This powder melts and fuses with the iron and gives to the latter when cooled a hard, white, glossy surface. Prior to the invention of the Arrott patent the enameler caused the powder to flow by tapping the handle of the sieve on the upward and downward strokes of a loop of iron passed over the handle. Arrott devised an automatic tapper concealed in the handle of the sieve and operated by compressed air. The workman by touching a valve button secures a rapid, continuous, and uniform rapping action, and is freed from the manual labor which the hand tapper necessitates.

The two other patents referred to in this case were also patents for dredgers or pneumatic sifters, each, however being operated by electricity and differing in certain details of construction from the Arrott dredger.

These three patents prior to May, 1910, were severally owned by three corporations defendants, as stated in the petition.

The defendants admit that they entered into uniform agreements with defendant Wayman, to whom the patents were assigned early in May, but they stoutly deny that the uniform agreements were the result of any understanding or arrangement between all the defendants, averring that each manufacturer entered into an agreement with Wayman independently of the other manufacturers. In other words, they contend that each license was the result of *individual* and not *collective* action.

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Judge Rose, in an exhaustive opinion sustained the contentions of the United States on every point. We refer to that opinion and to the detailed and accurate statement of facts therein, which we adopt. (A, 103–125.)

The decree, after reciting that the defendants had entered into a combination in restraint of trade and were attempting to monopolize such trade, adjudges and decrees as follows (A, 126):

> Fourth. That the so-called manufacturers' license agreements and the jobbers' license agreements, and the price lists made part of said agreements, all described in the petition herein, have been and are the means adopted and used by the defendants in order to carry into effect the objects and purposes of said unlawful combination in restraint of said interstate trade and commerce in violation of said act of Congress, and that the said agreements and price lists are therefore hereby declared illegal and the defendants and all and each of them and their officers, agents, servants, and employees are enjoined and prohibited from doing anything in furtherance of said manufacturers' license agreements and jobbers' license agreements, and from enforcing in any manner said agreements or any of the terms thereof, and from adopting or enforcing said price lists in interstate commerce in sanitary enameled ironware.
>
> Fifth. That the defendants, their officers, agents, servants, and employees, are enjoined

> and prohibited from continuing their attempt to monopolize interstate commerce in said ware by means of the unlawful combination hereinbefore described, and more particularly by means of said manufacturers' license agreements and jobbers' license agreements, and said price lists, or by any other means similar thereto.

The decree also prohibits the defendants from engaging in any like combination, but declares that the decree shall—

> not be construed to prevent whoever may be the owner or owners of the Arrott patent and other dredger patents relating to the manufacture of sanitary enameled ironware from granting lawful licenses to any of the defendants or others to use such patents; or to prevent the defendants or others from taking lawful licenses to use any of such patents. (A, 126.)

ASSIGNMENTS OF ERROR.

(A, 129–134.)

The assignments repeat many times in varying phraseology that the court erred (*a*) in holding the manufacturers' and jobbers' license agreements and the price lists illegal and void and unauthorized by the patent laws; (*b*) in holding that the owner of patents can not legally under the patent laws fix the price and prescribe the terms under which the product of the use of the invention covered by the patent can be sold and resold; (*c*) in holding that the

defendants had combined and adopted the agreements and price list as the means to carry into effect their illegal combination, and not for the purpose of improving the conditions of the business and preventing the manufacture and sale of defective ware; (*d*) in not dismissing the petition as to the individual defendants; (*e*) in not granting the motion of defendants to postpone the cause until the criminal proceedings pending in Michigan, on account of the same transactions, had been finally disposed of.

CONCERNING THE FACTS DISCLOSED BY THE RECORD.

(a) Facts showing how the combination was formed.

The evidence in support of the Government's contentions is overwhelming. In this brief we shall attempt merely to outline the salient facts.

The plan, briefly described, included three parts: (1) A manufacturer's license agreement; (2) a jobber's license agreement; and (3) a price list which established the prices of the manufacturer to the jobber and the resale prices of the jobber to the retailer or plumber.

Every corporation defendant signed the uniform manufacturer's license agreement with Wayman. To that license agreement, and as parts of it, were annexed the jobber's license agreement and the price list. The manufacturer agreed with Wayman that he would sell ware only to jobbers who should sign the jobber's license agreement with the manufacturer. The jobber bound himself on his part to confine his

purchases of ware to the 16 manufacturers who had contracted with Wayman. Manufacturers and jobbers stipulated to observe the prices established in the price book on sales by the manufacturer to the jobber and on resales by the latter to the plumber.

The dredger patents were assigned to Wayman May 4 and 5, 1910, the contracts signed May 6, and the arrangement as to prices and all other terms of sales went into effect June 1. The petition was filed July 21, 1910.

The Government introduced much evidence to the effect that prior to the assignment of the three patents to Wayman the defendants, as the result of numerous meetings and conferences, had determined upon all the principal details of the manufacturers' license agreements, the jobbers' license agreements, and the price list. The object of this evidence was to establish an understanding between all the defendants, prior to the execution of the license agreements, as to what those agreements should contain, and to disprove the allegations of the answers that Wayman executed the agreements separately with each of the defendants without any previous cooperation between them.

To prove the effect of the combination in action—that is to say, the manner in which the arrangement devised by defendants operated upon and affected the commerce which it was designed to restrain—was the purpose in the introduction of a great part of the testimony. The enforcement of the unreasonable conditions embodied in the agreements; the control

of prices and elimination of all competition as to prices, first, between the manufacturers, and, secondly, between the jobbers; the efforts to force the independent manufacturers into the combination; the cutting off of supplies from jobbers who had not signed the uniform agreements; in fact, all the evidence which illustrates the power of and harm done by a great combination and monopoly in operation comes properly under this head.

Certain written statements and admissions were entered for all the defendants. (Exhibit 29, Record, II, 46–48.) These establish the organization of the corporation defendants, that the individual defendants are officers of the corporation defendants, that the factories for the manufacture of sanitary enameled ironware are located in 11 different States, all of which are named, and that "all the defendants have been and now are engaged in the manufacture of sanitary enameled ironware, such as bathtubs, washbowls, lavatories, drinking fountains, etc., at their respective factories."

The defendants not admitting in the answers that they are engaged in interstate commerce, the Government put in much testimony to show their manner of doing business and that the restraints complained of directly affect interstate commerce. (I, 55, et seq.; I, 211.) The Government introduced a bluebook entitled "List of Jobbers of Plumbing Supplies in the United States, July, 1910," containing the names of 389 jobbers scattered throughout the United States from Washington to Florida and from Maine to

California. Out of that number 340 executed license agreements with one or more of the corporation defendants. (I, 60–62; II, 49.) The manufacturers ship to these jobbers and the latter in turn reship the ware from their warehouses to their customers, retailers or plumbers. The jobbers are engaged in interstate commerce not only in buying but also in selling, for they reship to customers located in many States outside the place of business of the jobber. (Sullwold, I, 320; Bullock, I, 326; Gilmore, I, 330; Chandler, I, 341; Hirschfeld, I, 345; Harder, I, 365; Fleck, I, 372; Boardman, I, 381; Thorndyke, I, 388; Haff, I, 402; Davis, I, 411; Murray, I, 414; Grosswiller, I, 424; Collins, I, 531.) The unlawful agreements of defendants reached out to and restrained this commerce of the jobbers with their customers as well as the interstate commerce between the manufacturers and the jobbers.

The principal meetings had prior to the consummation of the combination with references to the record follow:

1. A meeting of the members of the Sanitary Enameled Ware Association at Pittsburgh, February 1, 1910. (Ex. 7, II, 12; I, 29–34, 37–38, 113, 226, 237, 245–248; IV, 233–235.)

2. A meeting of important manufacturers to consider the license plan called by Wayman, March 2, 1910, at Chicago. (Ex. 51, II, 105; I, 12–18, 94–95, 178, 180, 247, 248.)

3. A two days' convention of manufacturers of enameled ware at the Hotel Astor, New York City,

March 29 and 30. (Exs. 2 and 4, II, 2–3, 7; I, 9–11, 15–22, 26, 35–36, 43–45, 67–74, 98–109, 227–229, 237–239.)

4. Sessions of the price and schedule committee elected at the New York March meeting, held at the Colonial Hotel, Mount Clemens, Mich., April 8 to 14; at Pittsburgh, April 19; and at New York City, April 21. (Exs. 31–40, II, 62–73; Ex. 60, II, 112; I, 28, 45–48, 67–70, 75–84, 107–109, 150, etc.)

5. A meeting of all the manufacturers at the office of Noble, Jackson & Hubbard, attorneys, New York City, May 6, called for the purpose of signing the license agreements with Wayman. (Exs. 8–11, II, 13–40; Exs. 13–28, II, 42; I, 41–46, 66, 69, 111, 113, 186, 254.)

During the period covered by these meetings and prior thereto, Wayman carried on an extensive correspondence with the defendants, sending or taking in person to each of them the drafts of the proposed license agreement as these were revised from time to time. (I, 185–186.)

The minutes of the Sanitary Enameled Ware Association for February 1, 1910, named the persons present on that day. (II, 12.) Wayman had with him a rough outline of the contemplated licensing arrangement and asked an expression of opinion as to whether those present were in favor of the proposed arrangement. The majority said they approved the plan. (I, 31.)

A few days after that meeting, on February 7, Wayman wrote to each of the manufacturers "refer-

ring to the informal discussion that took place after the regular meeting regarding resale prices and license arrangement," and inquiring if he had any patents which he would be willing to assign. (I, 37–39.) Attached to that letter was a schedule of the "preferential selling discounts to jobbers asked for by the various manufacturers," and a list of the different provisions which the proposed license agreements were to include. (Ex. 141, II, 210–213; I, 245, 247; I, 37–39, 153–154.)

Wayman called the meeting of March 2 at Chicago for the purpose of discussing the license proposition. (I, 12.) That evening, after the meeting, Wayman drew up a rough outline of the contemplated arrangement, entitled "Memorandum of Agreement" (Ex. 3, II, 4), which he took around to some of the manufacturers for their signatures, and of which he sent copies to others. (I, 11, 25, 28, 35, 150, 181.) This memorandum was a tentative draft containing in rough form the provisions which were to be embodied in the final agreement in a more definite form. A reference to it, therefore, indicates the unlawful subjects which the defendants were discussing two months before they signed the final papers. Some of the significant paragraphs of the memorandum of agreement of March 2 follow. These refer to two schedules of prices—manufacturer to the jobber and resale by the latter to the plumber—provide for penalties upon manufacturer and jobber, etc. (II, 4.)

> 3. For each violation of the price regulations of the license agreement we agree to for-

feit a sum equal to the amount of the shipment in question, and such other penalties as may be agreed on.

4. The selling prices to the jobbers to be established through the licensor by a price committee appointed by the various manufacturers.

5. The resale prices to the jobber, taking into consideration the rebate for observance of buying and selling regulations, shall be figured as follows:

"High-grade goods, 25 per cent above jobbers' cost.

"Competition goods, $16\frac{2}{3}$ per cent above jobbers' cost."

6. The rebates to jobbers shall be as follows:

Ten per cent payable at end of period for strict observance of agreements, the details of the manner in which the rebates shall be made to be determined.

* * * * *

9. The details of contract forms between the manufacturers and the licensor shall be drawn up by the licensor and submitted for approval at the next special meeting to be held in New York City.

10. The licensor will also submit the same, covering agreement between manufacturers and jobbers.

11. The following "preferential discounts" from the selling prices established by the licensor will be allowed the various manufacturers on sales to jobbers only. * * *

It should be noted that *the above exhibit does not contain a single word relative to elimination of seconds.*

The "next special meeting" (par. 9, supra) came on March 29 and 30, at the Hotel Astor, New York City. Before that meeting Wayman sent to each manufacturer a "Sample copy of proposed form of license agreement" and a "Sample copy of proposed form of jobbers' agreement." These draft agreements, which closely resembled the final agreements which were adopted five weeks later, were gone over in detail at that meeting in New York. They were introduced in evidence by the Government (Exs. 8 and 10, II, 13 and 27), together with two resolutions adopted at the New York meeting (Exs. 2 and 4, II, 2 and 7). One resolution adopted at the New York meeting reads as follows:

MARCH 30, 1910.

Resolved, That the matter of license agreement and resale agreement be referred to a special committee of five (5); said committee to be elected at this meeting and to be known as the Price and Schedule Committee, which committee shall be elected directly should the motion to adopt this resolution prevail.

This committee shall interview the various manufacturers, obtaining their consent as evidenced by their signatures to the above-mentioned agreements. And when the consent of 85 per cent of the production is had, the agreements shall become binding and effective.

The commissioner is authorized to levy a special assessment, equal to the amount of one quarter's dues as now paid into the association, the proceeds of said special assess-

ment to be used for the purpose of defraying the necessary expenses incurred in carrying into effect the object for which this convention was called.

The undersigned agree to the above conditions, and in so appending their signatures hereby agree to give their prompt cooperation to the matter in question.

Thirteen companies signed the resolution above quoted. (II, 2.)

The price and schedule committee elected at New York in March consisted of Francis J. Torrance, first vice president of the Standard Sanitary Manufacturing Co.; Hermann M. Hoelscher, secretary of the L. Wolff Manufacturing Co.; A. H. Cline, secretary of the United States Sanitary Manufacturing Co.; T. R. Barnes, secretary of the Barnes Manufacturing Co.; and Howard T. Gates, secretary of the McCrum-Howell Co. The same men were elected May 6 to constitute the price commission provided for by the license agreement as finally adopted on that day. (I, 45–46.)

The price and schedule committee held a week's session at Mount Clemens, Mich., April 8–14. At the conclusion of the meeting Wayman, who had attended all the sessions, informed the other manufacturers by letter of the satisfactory results reached at Mount Clemens, stating "all the details of the license agreement and jobbers' agreement were thoroughly gone into and considered, every paragraph being carefully weighed; the committee making such

additions or eliminations as they considered advisable." (Ex. 31, II, 62.) He also notified them that a general meeting would be called at New York City during the first week in May for the purpose of executing the final license agreement papers which would "put this and the resale proposition into effect on June 1." On May 6 the manufacturers came together for that purpose. Two days before the Arrott patent had been assigned to Wayman for two years, and on the 5th the Dithridge and Lindsay patents were assigned to him. (Exs. 5, 6, 67, 70; II, 8–10, 117–124.)

Thirteen manufacturers attended the meeting of May 6 in New York City (I, 41–46, 52, 69, 111–113, 157, 186); called up in alphabetical order they signed the agreements which went into effect June 1, 1910 (I, 42). Three other manufacturers concluded similar contracts with Wayman during May and July. (II, 42.)

Judge Rose said (A, 104):

> No defendant entered into the agreement without knowing that at least thirteen of the other corporate defendants had executed it or intended so to do. Without this knowledge no one of them would have become a party to it.

And on page 105 of Volume A he said:

> The principles upon which these resale prices were to be worked out in detail had been agreed upon between Wayman and a committee chosen by nearly all of the corporate

defendants. This agreement was reached before any licenses were accepted and before any of the patents had become Wayman's.

The manner in which the defendants accomplished the assignments of the patents deserves special consideration. Wayman had no money and no credit. On May 2, W. A. Myler, secretary and treasurer of the Standard Sanitary Manufacturing Company, loaned Wayman 100 shares of Standard Sanitary stock, upon which he borrowed from a bank in Detroit $7,000, opening an account there. Wayman, on May 4 and 5, drew three checks upon that account for $5,000, $350, and $500 in favor of the Standard, Mott, and Wolff Companies, respectively, to pay for the three assignments. (I, 128–138.) Upon this expenditure of $5,850 Wayman bases his claim of right to control an output of enameled ware estimated to aggregate annually $14,000,000. (I, 5, 49, 50.)

The Standard Co. in reality paid Wayman to relieve them of the Arrott patent. Under the terms of the license agreement they were to pay him a net royalty of $1 a day per furnace operated. On 89 furnaces, their entire capacity, he was entitled to receive approximately $25,000 a year net royalty. Exhibit 132 (II, opposite p. 188) shows that they in fact paid him during the months of June, July, and August, 1910, at the rate of $20,000 a year, and that his total net royalty from all the companies was at the rate of $40,000 a year during those months.

Prior to May 4 Wayman had paid nothing. (I, 128, 188.) However, with the other defendants he sets up in his answer certain so-called "options" to buy the patents which it is asserted he had obtained in December and January from the three corporations. But he had given no consideration for those options—the amount that he was to pay, the length of the period for which he was to take the assignment, whether there should be an assignment of all interest in the patent for a period undetermined or merely the transfer of an exclusive license to use the patent—these and all other terms remained undetermined until months afterwards. There was not the semblance of a legal enforceable option. (I, 128–138, 187, 188; IV, 235, 239.)

It is manifest that the term "option" was invented by the defendants after this suit was brought, their purpose being to give to Wayman the appearance of having an interest in the patents during the months in which he was promoting the combination; in other words, to make Wayman appear to be a bona fide owner of the patents. See the examination of defendant Dawes on this subject by defendants' counsel. (III, 478–479.) It may be that early in the year the Standard, Wolff, and Mott companies had expressed a willingness to assign the patents, but to what was at most an approval of the proposed scheme counsel for defendants have applied the formal legal phrase of the granting of an option. (I, 188.)

(b) Facts showing how the combination worked.

On June 1 the licensing arrangement became operative; thereafter the various defendants carried on interstate commerce in sanitary enameled ironware, subject to its provisions.

The several agreements between the manufacturers and Wayman were introduced in evidence, but only one is printed in the volume of exhibits, as they are all alike. (Ex. 9, II, 20; see also Exhibits 13–28, II, 42–45.) A copy of the jobbers' license agreement is Exhibit 11. (II, 32.) The price list, a book an inch thick, adopted by the defendants, appears in part in the record as Exhibit 41. (II, 74–92.) This price book establishes prices on sales by the manufacturer to the jobber and on resales by the jobber to the plumber. It gives the delivered prices at all jobbing points in every State and equalizing rates to 4,000 towns. (II, 95.)

The licensing arrangement evidenced by the exhibits enumerated in the last paragraph restrains trade in the following respects, among others:

1. Each of the 16 manufacturers agrees to sell to jobbers at the prices fixed in the price list, thereby eliminating all competition between them as to prices. Certain of the smaller manufacturers are allowed special differentials or preferential discounts, which enable them to sell some articles at lower prices than the larger manufacturers, but these differentials they may not vary, and they were fixed by agreement of all the defendants. (II, 22.)

2. The license agreement provides for a price commission of six, "five of whom shall be designated by a majority of the parties holding licenses similar to this license." The sixth member is Wayman. This commission has control over prices, preferential discount, and conditions of sale. (II, 23; I, 66.)

For membership of the commission, see supra, pp. 24.

3. The manufacturer's license agreement forbids any manufacturer selling to any jobber who has not signed the uniform jobber's license agreement.

4. The jobber's license agreement requires every jobber to resell at the prices fixed in the price list. (Ex. 11, II, 36.) This eliminates all competition between jobbers as to prices. The price list divides the country into 11 territories or zones. Every jobber selling outside the zone in which he is located must observe the prices established for that zone.

5. Jobbers are forbidden to "purchase, sell, advertise, solicit orders for, or in any way handle or deal in sanitary enameled ironware of any manufacturer not licensed under the letters patent enumerated herein." The penalty imposed on the jobber for breach of this condition is cancellation of the agreement and forfeiture of all rebates; thereafter the jobber can not obtain sanitary enameled ironware from any of the 16 manufacturers at any price. (Ex. 11, II, 37, par. 10.)

6. Penalties were imposed upon manufacturers and jobbers alike for breach of any of the conditions of

the contracts. This was effected in the case of the manufacturer by the manufacturer paying to Wayman more than the royalty the latter was entitled to retain provided the manufacturer had observed the license agreement. The nominal royalty was $5 a day per furnace, but at the end of the fourth month 80 per cent of this, or $4 a day per furnace, for the first month was to be refunded if the manufacturer had not broken the contract. As there are 25 working-days to the month and 4 months pass before any repayment, Wayman held at all times subject to forfeiture $300 on each furnace. There are 195 furnaces. Therefore, when all had been running, Wayman after the end of the third month held at all times nearly $60,000 of the manufacturers' money, paid ostensibly as a royalty, but, in fact, as bail to secure the performance of the unlawful provisions of the contract. (Ex. 9, II, 21, 24; Ex. 132, II, opposite p. 188; see also opinion of Judge Rose, A, 104.)

The cash security in the case of the jobber was obtained by a system of rebates payable at the end of the calendar year by the manufacturer to the jobber, provided the latter had observed the terms of the agreement. Judge Rose finds that under the arrangement the corporate defendants would hold toward the close of every calendar year in the neighborhood of half a million of the jobbers' money. (See opinion of Judge Rose, A, 106; also II, 34–36.)

7. The price list, a book an inch thick, fixes the prices throughout the United States from manufac-

turer to jobber and jobber to plumber. Some pages of this exhibit were printed. (Ex. 41, II, 74–92.) It divides the United States into 11 zones, naming the jobbing points in each zone. On page 92 of Volume II will be found a typical page of this price list, illustrating the method adopted for ascertaining the price of a bathtub on two sales, first, from the manufacturer to the jobber, and, second, from the jobber to the plumber. The table of figures and discounts printed on that page govern the sales of all tubs of the type indicated at the top of the page. (See also I, 86, and Ex. 133, I, pp. 210 et seq.)

The price list purports to be the property of Wayman. Page 2 reads as follows (II, 76):

> JUNE 1st, 1910.
>
> *To licensed jobbers' salesmen:*
>
> This price list is the property of E. L. Wayman, Arrott Building, Pittsburgh, and is loaned to you with the understanding that it is subject to recall at any time. The prices given herein are the selling prices I have established to plumbers on sanitary enameled ironware manufactured by the following companies operating under patents owned by me and to whom I have granted licenses:
>
> (Enumerating 16 licensed manufacturers.)
>
> It is necessary for all licensed manufacturers to sell their product manufactured in accordance with these patents on the terms herein established, and you are hereby notified that the license agreements executed by your company obligates it to resell the various licensed

products at no better prices, terms, or other regulations than herein established. As changes, additions, or eliminations occur, new sheets will be issued promptly.

E. L. WAYMAN.
ARROTT BUILDING, *Pittsburgh, Pa.*

Oscar A. Kroos, secretary of the J. M. Kohler Sons Company, independent manufacturers, prepared a tabulation based upon the price list, showing the increases in prices which his company would have received had it entered the combination. These increases ranged from 1 to 45 per cent. (I, 464.) See that portion of the opinion of Judge Rose which relates to prices. (A, 109–112.) On page 111 he states "The record shows that the agreements were intended to raise prices and that they did so."

(c) Extent of control obtained by the combination.

Only two manufacturers of any consequence, the J. M. Kohler Sons Company, of Sheboygan, Wis., and the Iron City Sanitary Manufacturing Company, of Pittsburgh, Pa., refused to enter the combination. Several smaller manufacturers did not join—the Blairsville Enameled Ware Company, of Blairsville, Pa.; the Washington Iron Works, of Los Angeles, Cal.; Louis Lipp, of Cincinnati, Ohio; and the Rundell Manufacturing Company, of Milwaukee. (Kohler, I, 243–244.)

The manufacturers who formed the combination controlled more than 80 per cent of the business. (Wayman, I, 69.) President Ahrens, of the Stand-

ard Sanitary Manufacturing Company, wrote Mr. Kohler, May 7, 1910, the day after the New York meeting, "The Iron City concern and yourselves are the only people of importance who have not signed." (II, 232.) Mr. Kohler and Mr. Kelly, the latter secretary of the Iron City Company, each testified to repeated and persistent efforts on the part of defendants to bring his company into the combination.

Wayman telegraphed Kohler from New York during the meeting of March 29 that 91 per cent of the production "was favorable to the plan." (II, 109.) Of those present at that meeting only two insignificant companies, Blairsville and Clymer, stayed out. Neither Kohler nor the Iron City Company had ever looked upon the proposition favorably.

Each of the 11 jobbers summoned by the defendants testified on cross-examination by counsel for the Government that a very large proportion of his purchases was from the defendants, ranging from 80 to 95 per cent in the case of the different witnesses. (Clow, IV, 28; Hartnett, IV, 40; Pierce, IV, 47; Felix, IV, 56; Ivy, IV, 61; Stringer, IV, 74; Zander, IV, 78; Hunting 84; Sisk, IV, 89; Callow, IV, 94.)

An even larger per centage of jobbers signed the contracts. President Ahrens, of the Standard, writing July 11, 1910, to Mr. Sullwold, president of the Western Supply Company, a jobber who refused to sign the license agreement, said (I, 291):

> On the day I left Chicago we had secured signatures from 333 jobbers out of a total of less than 370, giving us fully 90 per cent of

> the jobbers and more than 90 per cent of the purchasing power. (See also I, 312 to 314, 321, and 324.)

On July 18 Ahrens wrote to the same person (I, 296):

> Within 30 days after the jobbers' contracts were sent out 90 per cent of the legitimate jobbers of the United States had signed and returned them.

Vice President Torrance, of the Standard, wrote to Mr. Sullwold June 16 (I, 303), referring to the jobbers who had registered with the Standard:

> The names cover from the Atlantic to the Pacific; with the exception of one customer in New England, all the trade there have signed up.

The Government introduced a bluebook recognized in the trade as the list of all the principal jobbers of sanitary enameled ironware in the United States. This list is printed as Exhibit 30. (II, 49 to 61.) The jobbers who signed the agreement are all checked in that list; to them must be added the jobbers who are not in the bluebook, but whose names appear at the end of the exhibit. (I, 60–61.)

Of the 389 jobbers listed in the bluebook, 340 signed jobbers' license agreements with the defendants, and 48 smaller jobbers, not so listed, also signed. (I, 60–63, 89, 223, 232, 263, 388.)

(d) Acts illustrating the oppressive character of the combination.

June 1 the corporation defendants distributed the forms of the jobbers' license contracts among their customers and with each contract sent a letter containing this sentence:

> It is necessary for you to execute these contracts before we can sell you licensed sanitary enameled ware.

Some of these letters are printed in the Volume of Exhibits. (II, 101, 102, 281–287.)

Each jobber's contract had printed at the top the following:

> NOTE.—This contract must be executed by the purchaser in order to purchase licensed sanitary enameled ironware. (II, 32.)

The Government summoned a large number of jobbers from different parts of the country to prove the enforcement of this provision of the contract. As pointed out above (supra, p. 19), each of these jobbers does an interstate business in selling as well as in buying. In each case the testimony of the jobber was supplemented by letters from one or more of the defendants, illustrating the methods and the effect of the combination upon the independent jobbers and the manufacturers. The details of this testimony, of course, must be omitted in this brief. A list of some of the jobbers who gave testimony of the character indicated, with reference to the record, follows:

Fred H. Boardman, secretary and general manager of Ronalds & Johnson, jobbers at Brooklyn, New

York City, and Camden, N. J., selling and shipping to customers in New York, New Jersey, Pennsylvania, and other States. (I, 381.) Prior to June 1 this company bought from the Standard, Weiskittel, Barnes, Cahill, Day Ward, Kerner, McVay & Walker, McCrum Howell, United States, and L. Wolff Companies. Each of these 10 companies joined the combination. He produced the jobbers' contracts received early in June from each of the manufacturers, with a letter accompanying each contract stating: "It is necessary for you to execute these contracts before we can sell you licensed sanitary enameled ware." (I, 382.)

Ronalds & Johnson refused to sign the agreements. At the time the witness testified (Nov. 23, 1910, I, 344, 381) his company was unable to obtain the ware of any of these companies except through other jobbers, its competitors, at resale or plumbers' prices. (I,384.) (For correspondence see II, 344.)

Henry E. Bullock, president of the Illinois Malleable Iron Co., jobbers at Chicago, selling and shipping to customers in Indiana, Michigan, Illinois, Iowa, and Wisconsin. (I, 325 et seq.) He refused to sign the agreements. Thereafter he was unable to buy the ware of the licensed manufacturers except from other jobbers at resale prices, and he had difficulty in buying even in this manner. (I, 329.) The Kohler and Iron City Companies, independents, do not make all patterns, and therefore Mr. Bullock's company was obliged to cancel orders. (I, 328.) This witness produced letters from the Standard, United

States, and National Sanitary Companies declining to make shipments because the agreements had not been signed. (II, 301–308.)

Charles H. Chandler, of the Chandler Co., Cedar Rapids, Iowa, selling and shipping to customers in Iowa, South Dakota, Minnesota, Wisconsin, Kansas, and Missouri. (I, 341 et seq.). Before June 1 this company bought practically all their ware from the United States Sanitary Manufacturing Co. The latter company declined to sell ware after the Chandler Co. had refused to sign the contract. (I, 342.) (For correspondence produced by this witness see II, 325–328.)

Frank Collins, vice president National Supply Co., jobbers at Toledo, Ohio, selling and shipping to customers in Ohio, Indiana, and Michigan. (I, 530–573.) Prior to June 1 he did business with the United States, Standard, Humphryes, and National Sanitary Companies, principally with the United States. He received the contracts and accompanying letters, but did not sign any of the contracts. (I, 532.) For some time after June 1 the companies refused his orders (I, 541), but later Mr. Collins offered as an inducement to Mr. Torrance, vice president of the Standard, to confine his purchases to the Standard Co. if it would sell to him, although before June 1 Mr. Collins had been buying practically entirely from the United States Co. The Standard agreed to sell him on these terms. (I, 542, 544, 545, 566.) A letter from Theodore Ahrens, president of the Standard Co., to Mr. Collins was

introduced in evidence, with the following footnote in Mr. Ahrens's handwriting (I, 545):

> You can readily understand that we don't want you to buy elsewhere unless, as in this instance, there is a good reason for it. It would not be good policy to cut out United States altogether. Better give them some and keep them from kicking.

Edward T. Davis, of New England Plumbing Supply Co., jobbers, at Boston, selling and shipping to customers throughout New England. (I, 411.) This witness at the time he testified (Nov. 23, 1910) was unable to obtain the ware of any of the defendants except from other jobbers at plumbers' prices. He received the usual license agreements and accompanying letters, but refused to sign the contracts.

John G. Fleck, of Fleck Bros. Co., jobbers at Philadelphia, selling and shipping principally to customers in the State of Pennsylvania, but also generally throughout the country. (I, 372, 378.) This company received the usual contracts and accompanying letters, but (I, 374) refused to sign the contracts. Prior to June 1 practically all of its business had been with the Standard, United States, and Cahill Companies. After June 1 it obtained their ware from other jobbers at resale prices. (I, 380.) (For correspondence see II, 342–343.)

James K. Gilmore, president D. M. Gilmore Co., jobbers at Minneapolis, Minn., selling and shipping enameled ware to customers located in Minnesota, North and South Dakota, Wisconsin, Iowa, and Mon-

tana. (I, 330 et seq.) This witness received the contracts about June 1 from the different companies with the accompanying letters. (I, 337–339.) Thereafter his trouble began. Manufacturers whose goods he had been handling refused to sell to him. (I, 332.) Everybody he attempted to buy goods from wanted him to sign the agreement. He was able to buy licensed goods from other jobbers, but only at resale prices. (I, 339.) The witness produced correspondence substantiating his statements. (II, 309–324.)

Joseph F. Grosswiller, president of Joseph F. Grosswiller Supply Co., Toledo, Ohio, selling and shipping to customers in Ohio, Michigan, and Indiana. Prior to June he did business with the L. Wolff, Cahill, Standard, and Iron City Companies. (I, 423–448.) He received the usual contracts, which he refused to sign. (I, 425.) The witness produced letters proving refusals to fill orders after June 1 by the Standard, Cahill, and L. Wolff Companies. Some of these orders were for ware specified by the architect and could not be filled through another manufacturer. These letters appear in I, 426, 427, 428, 430, 432, 435, 437, 438, 439, 440, 442.

Erastus E. Haff, of F. N. Du Bois Co., jobbers at New York, selling and shipping to customers in New England and the Middle States. (I, 402–409.) Before June 1 he did business with the Standard, Weiskittel, Cahill, Day-Ward, Kerner, and McCrum Howell Companies. (I, 402.) At the time he testified (Nov. 23, 1910) he was unable to obtain ware of these manufacturers except through other jobbers

at plumbers' prices. The witness produced the usual contracts, with accompanying letters. (I, 406.) (See other correspondence, II, 354–358.)

Victor A. Harder and *Victor A. Harder, jr.*, officers of Mayor, Lane & Co., jobbers, 50 years in business at New York, selling and shipping to customers in New York, New Jersey, Connecticut, Massachusetts, Pennsylvania. They produced the usual contracts and accompanying letters. (I, 364–372.) They did not sign the license agreements, and after that they were unable to buy the goods of any of the licensed companies. (I, 371.) (For correspondence see II, 337 and 341.)

Charles S. Hirschfeld, half owner of Central Plumbers' Supply Co., jobbers at New York, selling and and shipping to customers in New York, New Jersey, Connecticut, Massachusetts, and Vermont. Prior to June 1 the company did business with the Standard, United States, Barnes, Humphryes, Cahill, and Weiskittel companies. (I, 344 et seq.) The witness received the usual contracts with accompanying letters on the morning of June 6. (I, 349–350.) Thereafter he was unable to obtain the goods of the licensed manufacturers. He testified (I, 362) that he tried to purchase and was refused and was unable to obtain at the time of his testimony the ware of the Standard, United States, Cahill, Humphryes, and Barnes companies. (I, 362.) This witness also produced correspondence. (II, 329–336.) In declining one order defendant Standard Co. wrote, July 14:

> In reference to releasing this material and making shipment, regret to advise that *we can not do so, although this material is at present prepared for shipment*, but we have instructions not to make any shipment until in receipt of your signature to the resale agreement which was forwarded you some time ago. Upon receipt of your signature we will make immediate shipment. (II, 330.)

Edward W. Hotchkiss, president Hotchkiss, Vail & Garrison Co., jobbers at New York. (I, 392 and 402.) This witness refused to sign the contracts and had the usual trouble. He finally signed in August. He produced many letters. (II, 345–353.) (See also letters produced by Wayman relating to the same matter, II, 179–183.)

John A. Murray, of the John A. Murray Co., jobbers at New York, selling and shipping to customers in New York, Connecticut, New Jersey, and Pennsylvania. Prior to June 1 he did business with the Standard, Cahill, Humphryes, and United States companies. At the time he testified was unable to get the goods of any of these manufacturers, as he had refused to sign the contract. (I, 416.)

John L. Sullwold, president Western Supply Co., jobbers at St. Paul, Minn., selling and shipping to customers in the States of Minnesota, Wisconsin, Iowa, North and South Dakota, Montana. (I, 289–325.) On June 7th, after receiving the jobber's contracts, Mr. Sullwold wrote Wayman asking for permission to continue to sell the ware of Kohler, the independent

manufacturer. (I, 317.) Wayman refused permission (I, 318) and Sullwold then declined to sign the contract. Thereafter he could not obtain the ware of the licensed manufacturers except from other jobbers, his competitors. (I, 322.) The Government introduced in evidence through another witness a letter proving that Wayman allowed the licensed jobbers in Sullwold's territory to quote from 10 to 12½ per cent below the resale prices. (II, 317.) This concentrated the power of the combination against Sullwold. The witness produced voluminous correspondence between himself and Ahrens and Torrance, officers of the Standard Co., and Wayman, which will be found in the record. (II, 258–300.) (See also I, 291–320.)

Herbert W. Thorndike, treasurer F. W. Webb Manufacturing Company, jobbers at Boston, selling and shipping to customers in Maine, New Hampshire, Vermont, Massachusetts, Rhode Island, Connecticut, and New York. (I, 388.) This witness produced the usual contracts and accompanying letters. He refused to execute the license agreement. Prior to June 1 he did business with the Standard, Kerner, and United States companies. After that date he was unable to buy the goods of those manufacturers except from other jobbers at resale prices.

In view of the testimony of these fifteen jobbers it is not surprising that Judge Rose said in his opinion, "May, 1910, must have been a trying time for jobbers with a stubborn liking for independence and a

taste for managing their own business in their own way." (A, 107.)

The following letter illustrates the arbitrary methods of the defendants (II, 299):

JUNE 10, 1910.

The WESTERN SUPPLY CO.,
St. Paul, Minn.

GENTLEMEN: Replying to your letter of the 7th, it is impossible for me to give you permission to continue buying goods from the J. M. Kohler Sons Co., Sheboygan, Wis. This company has been invited to execute a license agreement and use the patented process, but has not seen fit to do so. I would like to have them execute an agreement, but if they will not it is impossible to concede to any of their customers the right to purchase their goods if the customers desire to purchase licensed ware.

I hope that you will take the matter up with them and try and convince them that they should manufacture goods in accordance with the other companies.

Yours, very truly,
E. L. WAYMAN, *Licensor.*

This telegram is also a fair sample (II, 158):

JUNE 17, 1910.

ATLAS SUPPLY CO.,
Muskogee, Okla.:

If you will sign license agreement, will authorize you to handle Kohler ware subject to resale terms for a reasonable length of time, with understanding that you will at once decrease your purchases and stock licensed ware

and further sale of it and furnish me monthly statement of purchases from Kohler. Licensed manufacturers desire to give all assistance possible to jobbers in order that they may make a fair margin of profit and do not desire to inflict any hardships, but do believe they merit the support of all jobbers in this proposition. Southwest, Kansas City Pump, Young & Crane are supporting licensed manufacturers. Reeves wires he has put resale into effect and intends to sign. Expect U. S. Water will sign to-day. Wire answer.

E. L. WAYMAN.

The following letter written by an agent of one of the appellants is also illustrative of their methods (I, 334–336):

CHICAGO, *August 26, 1910.*

D. M. GILMORE CO.,

Minneapolis, Minn.

GENTLEMEN: * * * As I wired you from Kansas City, I received a telegram from the home office notifying me that you had asked them to ship some tubs and that it was absolutely necessary for you to sign the enameled-ware contract before they could do so. In my telegram to you I advised your signing it at once.

Upon my return to the office I found a letter from our secretary in which he states that Mr. Wayman was sending a letter to the jobbers in your territory *who had signed up their contracts.* He has stated to them that they are at liberty to quote from 10 to 12½ per cent below the resale price in the district

effected by the Western Plumbing Supply Co. You can see from this that it is Mr. Wayman's intention to protect the jobbers who have *signed the agreement* against the cut prices being made by certain jobbers who are not cooperating in the resale price. * * *

Yours, very truly,

S. O. DUGGER.

P. S.—I want you to treat this letter as strictly confidential for I am not sure whether or not I am at liberty to give you this information.

The vice president of the Standard Manufacturing Company wrote this letter (II, 351):

PITTSBURG, U. S. A.,
June 27, 1910.

HOTCHKISS, VAIL & GARRISON,
New York City, N. Y.

GENTLEMEN: Answering your letter per E. W. H. of June 24th, would say that we have not entered orders dated subsequent to June 4th from any concern who has not entered into the resale agreement.

Our license from the owner of the patents and under which we act arbitrarily fixes what we should do in this matter.

I sincerely hope, for our mutual good, that you will see your way clear to sign the agreement as some two hundred fifty (250) other reputable jobbers in the United States have already signed.

Yours, very truly,

FRANCIS J. TORRANCE,
Vice President.

(e) The unlawful purpose of defendants.

The facts overwhelmingly establish the charge of the Government that the defendants, knowing full well that the combination was unlawful, tried "to conceal their true purposes and the real character of the combination by the adoption of a plan intended by them to give to their acts a lawful aspect and to the combination a legal form." (Petition, A, 8.)

The loan of the Standard stock to Wayman by an officer of that company; the assignment for $5,000 cash and an unsecured note of a patent which had cost the Standard $35,000; the provision for reassignment at the end of two years (II, 8); the agreement of the Standard to pay net royalties aggregating $25,000 a year for the patent which it practically paid Wayman to take; the knowledge of the defendants that an out-and-out price agreement is unlawful; the deliberate framing of the contracts ingeniously worded so as to give the impression that the arrangement related to patented articles; all these facts convincingly establish the intent of the defendants to violate the rule of public policy established by the Sherman Act (I, 128–138).

Pointing to the same conclusion were the numerous meetings of defendants, at which the license arrangement "was discussed in school and out of school, when the meeting was adjourned and before it was called; it was always discussed not as a license agreement, but something to better business conditions." (Kelly, I, 225.)

President Ahrens, of the Standard Company, wrote to Mr. Kohler, who refused to join the combination, May 7, 1910 (Kohler, I, 255):

> It is not possible to carry through a resale price without a strong organization among the manufacturers and without some manner of controlling prices.

The defendants made repeated and persistent but ineffectual efforts to bring the Kohler Company into the combination, for the latter denounced the arrangement as a plain attempt to overreach the Sherman law. (II, 107, 113.) Directly after the meeting of May 6, at which the contracts were signed and which Mr. Kohler had refused to attend, President Ahrens of the Standard Company wrote to him expressing his disappointment and asking for a meeting. This was had Friday, May 13, at Mr. Kohler's Chicago office. John Clifford, vice president of the L. Wolff Company, Francis J. Torrance, vice president of the Standard Company, and Mr. John B. Murphy, vice president of J. M. Kohler Sons Co., were also present. (Kohler, I, 253.) Mr. Kohler testified that Ahrens did most of the talking at the conference, and continued (I, 256):

> Q. What did you say?
>
> A. I put the question to them—I put the question to them, "You will admit that this equipment covered by the Arrott patent is not necessary in the manufacture of enameled ware." To which they practically assented. I then said, "Then its purpose is purely for the

> purpose of entering into an arbitrary price agreement?" Mr. Torrance said, "If you put it that way." I then said, "The patent in that case is purely a subterfuge, and this plan would be contrary to the laws of Wisconsin, which are very strict on that, and also the Sherman antitrust law, and we will not go in it." Mr. Clifford was impressed with the word "subterfuge." He said that was a very good word. *He also made the statement that the Government could do nothing more than break up the show.*

The counsel for the defendants did not cross-examine the witness upon this testimony nor call any of the other persons present at the meeting to contradict it.

Vice President Torrance, of the Standard Company, wrote on June 16, 1910, to Mr. Sullwold, a jobber who refused to sign, saying (I, 302):

> The resale agreement is the only legal remedy that can or may be applied to better conditions as they exist in the larger majority of jobbing centers.

Defendants were repeatedly warned that the arrangement was unlawful. Mr. Frank Collins, a prominent jobber of Toledo, Ohio, testified respecting a meeting of manufacturers and jobbers held in Toledo in June, at which defendants Ahrens, Torrance, Cline and others were present and made speeches urging the jobbers to join. His testimony is interesting (I, 534):

> I told them that in my opinion the entire proposition was illegal. They based their

claim for legality on the fact that they had had the advice of a bunch of attorneys whom, in their opinion, they considered the most qualified to give an opinion on this subject in the United States; that the said attorneys had many other schemes of this kind now in operation and that they were found to be legal, or at least had not been attacked by the Government. * * *

I told them in my opinion they should not accept any small firm's advice on a subject of so much import, that we had had a similar case in Toledo, and our icemen went to jail on the advice of their attorneys, and our brick and lumber men were all heavily fined, and that I had made up my mind, expert counsel to the contrary notwithstanding, that if they went into this thing they would all wind up in jail, and that I would not have anything to do with it, and strongly urged them not to go into it. (I, 535, folio 2.) (See also I, 74, 97, 110, 225, 256.)

Circular letters sent by Wayman, as commissioner of the Sanitary Enameled Ware Association, to the various manufacturers from December to April, 1910, prove that just before the licensing arrangement was entered into the manufacturers had been engaged in sharp competition. (IV, 231, fol. 3; Exs. 287–292, IV, 224–233.) One of the inducements which Wayman held out to them when he asked them to enter into the license agreements was that it would enable the companies to escape that competition. (IV, 232, fol. 2.)

Defendant J. T. Duryea wrote Wayman March 15, 1910, referring to the memorandum of agreement which Wayman had sent to him (supra, p. 21): "In the abstract it looks good to me providing all manufacturers sign up" — and in the same letter he said, "Of course we will be greatly influenced by what the other manufacturers do." (II, 131.)

The Day-Ward Co., one of the corporation defendants, wrote Wayman January 11, 1910, referring to the proposed agreement of licensed manufacturers, saying, "We would not care to have anything to do with it unless all the manufacturers of enameled ware were parties to the agreement." (II, 132.)

Judge Rose said of the agreements: "They destroyed competition. They fixed prices. For that purpose they were made. They had no other." (A, 112.)

Respecting the utility of the patented dredgers, the evidence sustains the allegations of the petition that "these patents and the tools they cover, while useful and valuable in the manufacture of sanitary enameled ironware, are not essential thereto." (A, 9.)

According to our view it makes no difference whether or not good sanitary enameled ironware can be made without the use of the patented dredger, for the dominion of the patentee does not include a control over commerce in an article in the making of which the patented tool is used. (Infra, p. 68.)

Even a bona fide owner of a patented tool or machine has no authority by virtue of his patent to regulate the prices and terms of sale of the article which results, in whole or in part, from the use of the patented tool or machine. In legal theory no distinction can be made because of differences of degree in the utility of patented tools. Therefore, whether the Arrott dredger is an essential or only a useful tool is an immaterial question in this case. The evidence introduced, however, on this point conclusively establishes that the dredger is merely a handy tool.

Judge Rose said:

> All that can be safely said is that the automatic dredgers are useful tools. (A, 117.)
>
> It follows that there is no respect in which every tub, in the enameling of which an automatic dredger has been used, differs from every tub in the enameling of which the hand dredger has been employed. Whether the ware shall be well or ill made, whether it shall be durable or the reverse, whether it shall be sightly or unsightly, depends upon many circumstances of which the kind of dredger used to sprinkle the powder is only one, and probably not the most important.
>
> * * * * *
>
> Defendants say that while it is true that the automatic dredger is a mere tool, used in only one operation of a number required for the making of the ware, and while it is conceded that merchantable ware can be made without its use, still the advantages of using it are so great that as a commercial proposition the

ware can not be made without it. It is unnecessary to consider what legal consequences, if any, would follow if the record sustained this claim. It does not. It is true certain witnesses say that in their judgment the automatic dredgers have become necessities for the manufacture of the ware for commercial purposes. The record conclusively demonstrates that they are mistaken. Such concerns as the J. M. Kohler Sons Co. and the Iron City Sanitary Manufacturing Co. have no rights under any of the patents. There is no evidence of their having infringed them. They make and sell the ware in large quantities in competition with the licensed manufacturers. Moreover, if the experience of the concerns which had the right to use the patented dredger had convinced them that the ware could not without their use be made good enough and cheap enough to be sold in competition with them, it is not conceivable that they should have gone to all the trouble they did to induce those two concerns to take licenses. According to the defendants' present theory the refusal to do so was tantamount to commercial suicide. If factories without licenses could not make ware which could be sold in competition with that made by those who had licenses, the fewer who had licenses the better for those who had. (A, 118.)

The ware is absolutely unpatented. Anyone may sell it as freely as he may a loaf of bread. No one can tell by looking at a bathtub whether enameled powder has been sprinkled upon it by a patent dredger any

more than anyone who eats a loaf of bread can tell whether it has been baked in an oven with a patented grate, or who lights a kerosene lamp can tell whether in the process of refining a patented tool has been used, or by taking a pinch of snuff can be sure that there was or not a patented mill used in grinding the tobacco. (A, 118.)

Some of the testimony to the same effect follows:

William H. Lose, superintendent of Iron City Sanitary Manufacturing Company, had been engaged in the enameled-ware business 20 years. (IV, p. 261, folio 4; 262, folio 1; 263, folio 3.) He testified that it is possible to make good sanitary enameled ware with the hand dredgers. (IV, 261, folio 4.) The dredger is a tool used in the manufacture of sanitary enameled ware. The power dredger is a more convenient tool than the hand dredger, but it is not a necessity in the making of good sanitary ware. (IV, 262, folio 1.)

Frederick D. Cook, president and manager of the Blairsville Enameled Ware Company (IV, 245, folios 2 and 3; 250–253), with 14 years' experience in the making of sanitary enameled ware, declared one can make good sanitary enameled ironware with the hand dredgers (IV, 249, folio 2). The Arrott dredger is a more convenient tool than the hand dredgers, but it is not a necessity. The word "tool" correctly describes the patented dredger. (IV, 249, folio 4.)

John C. Reed. This witness was manager of the Standard Works of the Standard Sanitary Manufac-

turing Company (III, 379); a witness called by and favorable to the defendants, he testified that merchantable, salable, enameled ware was manufactured by the hand dredger prior to the introduction of the new dredger (III, 390, folio 4). "I consider it possible to make what would be classed as a fair tub by the hand dredge." (III, 391, folio 1.)

James W. Arrott, jr., inventor of the Arrott patent, was called by the defendants. See his testimony on cross-examination. (III, 423, folios 3 and 4; 424, folios 1 and 2.)

John A. Lefferts, general superintendent Colwell Lead Company, witness for the defendants. (IV, 155.) On cross examination the witness admitted that at the time he testified (April 21, 1911) they were using the hand dredger at his factory, during the night hours, because they did not wish to keep the compresser running in the nighttime to supply the air for the pneumatic dredger; in other words, the advantage of the Arrott over the hand dredger did not compensate for the additional cost of running the compressor. This company made no distinction in its sales between the ware made by the hand dredger at night and that by the air dredger in the daytime. (See cross-examination, IV, 157–159.)

Also A. Weiskittel & Sons Co., a corporation defendant, at the time one of its employees testified (Feb. 20, 1911) was using the hand dredger at night to save the expense of running the compressor. Counsel for the Government dragged this fact out on cross-examination from a reluctant witness, who,

on direct examination, had testified that the Arrott dredger is absolutely essential in order to make sanitary enameled ironware. (Fisher, III, 195, 212–217.)

Every witness summoned by the defendants testified on cross-examination that many important elements enter into the making of enameled ware. The chemical analysis of the iron, the formula for the enameling powder, and the composition of the slush are all important factors and secrets in the business.

Judge Rose says (A, 117):

> Whether the ware shall be well or ill made, whether it shall be durable or the reverse, whether it shall be sightly or unsightly, depends upon many circumstances of which the kind of dredger used to sprinkle the powder is only one and probably not the most important. Much turns on the composition of the enamel. Each factory makes it according to its own formula, which it tries to keep secret. Perhaps none of the powders in use give complete satisfaction. Experiments for their bettering are continually being made. How controlling a part the composition of the powder plays is shown by the account given by one of defendants' witnesses of the disastrous results upon the ware of an experimental change in the powder made since the first of the present year by one factory. The liquid enamel or slush coat must be properly made and fittingly applied. The furnaces must be adapted to the work to be done by them. The appliances for putting the ware into the furnace and for taking it out again

must be constructed so that with little consumption of time and labor the work will be done without damaging the delicate enamel not yet firmly fused upon its base. The castings must be well made and of the right kind of metal. It is quite possible that a new tool, appliance, or process may be invented for the better doing of any one of them. Its use may improve the average quality or cheapen the average cost of the ware, or both. Every such an inventor, if he obtained a patent for his invention, would be as much entitled as Wayman to say at what price and upon what terms men might deal in the finished article in some stage of the making of which his invention had been used.

(f) Defendants' testimony.

Defendants' testimony occupies Volumes III and IV, not including pages 245 to 268 in the fourth volume, which are given to the Government's rebuttal. The great bulk of defendants' testimony was introduced in an effort to establish the superiority of the automatic dredger over the hand dredger. Volume III, pages 1 to 426, contains such evidence only. Not one of the witnesses whose testimony is included within those pages attended any of the meetings of the defendants referred to above in this brief (p. 19) or knew anything about the license plan until it had been consummated, and then only what was told him by the superior officers of his company. (This statement does not apply to the witness Duryea, III, 259–282, a defendant and president of one

of the minor companies, who knew of the negotiations.) (See II, 131.)

Pages 427 to 469 of Volume III contain the evidence of five individual defendants summoned at Philadelphia by the defendant, Colwell Lead Company, in order to give them immunity. Having been warned by the counsel for the Government that they would gain no immunity, not having been summoned on the part of the United States (Goebel, III, 427), these witnesses refused to answer a number of questions, invoking the privilege against self-incrimination. The Colwell Lead Company applied to the court to compel them to answer, but United States District Judge Holland, on April 22, 1911, denied the application (187 Fed., 232), and this court declined to issue a writ of certiorari to review his decision May 29, 1911. (220 U. S., 623.)

The balance of Volume III, pages 470 to 528, and the first part of Volume IV, pages 1 to 22, contain testimony of other defendants summoned by the Colwell Lead Company for the same purpose, Judge Holland not having at that time rendered his decision. These witnesses also declined to answer a number of questions, some addressed to them by counsel for the Colwell Lead Company, some by their own counsel, and some by counsel for the Government. Their own counsel read certain allegations of the petition to them, which they severally denied, but when cross-examined by counsel for the Government respecting the same allegations they refused to answer on the ground of self-incrimination. (For

sample see cross-examination of A. C. Walker, III, 501 et seq.)

Counsel for the defendants called to the stand eleven jobbers. (IV, 25–98.) Each testified that he was not forced to sign the license contract; that conditions in the trade improved June 1, 1910; that seconds were eliminated, and that he made more money under the license arrangement than previously; finally, that the resale arrangement went to pieces January 1, 1911, and as a consequence seconds and bad ware again flooded the market, and he was making little, if any, profit.

On cross-examination each of these jobbers testified that from 80 to 95 per cent of his purchases was from defendants; that his jobbing business extended into several States; that he had observed the resale prices until January, 1911, and that most of the bad ware on the market since January 1 came from the defendants. (IV, 34, 52, etc.)

This latter testimony as to the source of seconds after January, 1911, confirms our contention that the so-called license arrangement was devised to control manufacturers' prices and jobbers' resale prices. If the defendants sought the use of the automatic dredger solely in order to eliminate seconds (Answer, A, 51), why did seconds appear on the market, after January 1, 1911, although all the defendants had obtained the right to use the automatic dredger?

The defendants closed with the testimony of Wayman, whom the Government had already examined

as a witness for the prosecution. (I, 1–217, 493–498, 523–529.) Counsel for the defendants examined him at great length (IV, 98–244), attempting to show that Wayman conceived the idea of a licensing arrangement under the Arrott patent; that he purchased it on his own initiative and bona fide; that there was no combination between the defendants, and that Wayman merely did what he had a right to do with his own. This theory calls for no comment here. As defendants had been cooperating with Wayman for months prior to the consummation of the plan the fact that the latter may have originated the idea and manner of combining is of no importance. "It can make no difference whether those personally assisting in or contributing to such wrongful result were original laborers in the vineyard or came at the eleventh hour—their statutory recompense is the same." (*United States* v. *MacAndrews & Forbes Co.*, 149 Fed., 823.)

(g) As to the Colwell Lead Co.

The status of the Colwell Lead Co., which appears by separate counsel, is in no wise different from that of the other defendants, in whose answer they at first joined (A. 67–77). Subsequently they filed another answer setting up the defense that they are not engaged in interstate commerce.

They signed the license agreement on May 25, 1910. (Ex. 14, II, 42.) Wayman's letter, made a part of that contract, and upon which their counsel placed so much emphasis in his examination of

Duryea (III, 267–268), does not qualify the contract. Its acceptance by the Colwell Co. is a recognition of the resale prices and conditions, and a promise to observe them, Wayman agreeing "If the resale conditions governing sales by jobbers to plumbers in the city of New York should become such that you would be seriously handicapped in the sale of your product to your plumbing trade, I, as licensor, hereby agree, *in case I can obtain the consent of the Commission provided for in the license,* to afford to you such relief as may be necessary."

When Duryea, president of the Colwell Co., was in the West, he received a memorandum of agreement which Wayman prepared March 2, and then wrote Wayman as follows:

> MARCH 15, 1910.
>
> Mr. E. L. WAYMAN.
>
> DEAR SIR: Yours of the 9th, enclosing memorandum of agreement, just received.
>
> In the abstract it looks good to me, providing all manufacturers sign up. However, I do not care to go on record regarding it until I have had an opportunity of going over it in detail with you, though of course we will be greatly influenced by what the other manufacturers do.
>
> I expect to be in my office about the 1st of April and will be glad to hear further from you.
>
> Yours, truly,
>
> J. T. DURYEA.

(III, 271; I, 145; see also Ex. 76, II, 131.)

Duryea's letter is typical of the attitude of the manufacturers toward each other. No defendant would have executed the agreement unless he had been certain that all the other defendants would execute it. (See also Ex. 78, II, 132, fol. 3; Ex. 84, II, 137; Ex. 85, II, 138; Ex. 93, II, 146, fol. 2.)

The Colwell Co. is engaged in interstate commerce; it ships its products from Elizabethport, N. J., to New York, Brooklyn, and Worcester, Mass. (III, 262, fol. 3); it sells from its New York office to Connecticut (III, 270).

Furthermore, the Colwell Co., as one of the combination, is restraining the interstate business of the other defendants, for it is in agreement with them as to prices and other terms of sale. Even if it is not itself engaged in interstate commerce, it is violating the Sherman Act by restraining the interstate commerce of others. (*Loewe* v. *Lawlor*, 208 U. S., 227.)

President Duryea was properly made a defendant in this action. In *U. S.* v. *American Tobacco Co.* (221 U. S., 106), this court held that the lower court erred in dismissing the bill as to the individual defendants, and that the decree, to afford adequate relief, should be directed against the officers of the corporation as well as against the corporation.

Judge Rose said in his opinion below respecting the Colwell Co. (A. 124):

> The Colwell Lead Co. says it is not engaged in interstate commerce. In our view it is.

It makes its ware in New Jersey. It sends it to warerooms in New York City and in Worcester, Mass., and there sells it. Its trade extends over several States. It alleges that it had no part in any of the negotiations leading up to the formation of the scheme, that it did not execute a license agreement until some three weeks after the other corporate defendants, and that then it refused to bind itself to charge the resale prices. It was consulted through its president sometime before any of the agreements were actually entered into or before their precise terms were definitely settled. He then gave a general approval of the plan. Neither he nor it appear to have done anything further until after the others had signed up.

PROPOSITIONS OF LAW.

I.

APPLYING THE RULE OF REASON TO THE FACTS IN THIS CASE, IT IS MANIFEST THAT DEFENDANTS BY MEANS OF THE LICENSE AGREEMENTS UNDULY AND UNREASONABLY RESTRAINED COMMERCE AND ATTEMPTED TO MONOPOLIZE COMMERCE IN ENAMELED WARE.

In every case we use the standard of reason for the purpose of determining whether or not an act or alleged restraint of commerce has brought about the injury from which the Sherman Antitrust Act is intended to guard the people. "In every case where it is claimed that an act or acts are in violation of the statute the rule of reason, in the light of the principles of law and the public policy which the

act embodies, must be applied." (Mr. Chief Justice White in *Standard Oil Co.* v. *U. S.*, 221 U. S., 1, 66.)

If the acts complained of have caused the wrongs which the statute forbade, resort to reason is not permissible to allow that to be done which the statute prohibits.

It matters not what form the combination may take, or what garb or dress it may put on, for if it directly restrain commerce it falls within the operation of the statute.

Mr. Chief Justice White said in the tobacco decision (221 U. S., 106) that it had been held in the Standard Oil case that the first and second sections of the act taken together

> embraced every conceivable act which could possibly come within the spirit or purpose of the prohibitions of the law, without regard to the garb in which such acts were clothed. That is to say, it was held that in view of the general language of the statute and the public policy which it manifested, there was no possibility of frustrating that policy by resorting to any disguise or subterfuge of form, since resort to reason rendered it impossible to escape by any indirection the prohibitions of the statute.

In the Northern Securities case, Mr. Justice Harlan, referring to the Sherman Act, said (193 U. S., 197, 347):

> No device in evasion of its provisions, however skilfully such device may have been con-

> trived, and no combination, by whomsoever formed, is beyond the reach of the supreme law of the land, if such device or combination by its operation directly restrains commerce among the States or with foreign commerce in violation of the act of Congress.

The appellants adopted in this case a form of combination different from any heretofore considered by this court. But it is the form alone that is new. Behind the grinning mask of the "license agreement" is the common, vulgar type of monopoly which many times has been condemned by this court, dangerous alike to "individual liberty and the public well being." (*U. S.* v. *American Tobacco Co.*, 221 U. S., 183.)

Two decisions of this court dispose of this case: *Continental Wall Paper Co.* v. *Voight & Sons Co.*, 212 U. S., 227, and *Dr. Miles Medical Co.* v. *Park & Sons*, 220 U. S., 373.

Each of the cases just cited involved a scheme of uniform contracts similar in character to the contracts under consideration in this case. The important difference between the two cases is that in the wall-paper case a combination of manufacturers attempted to control the prices of the products of all of the manufacturers, whereas in the proprietary-medicine case one manufacturer, while also having control of prices in view, restricted his plan to control of prices of his own products. In the first case the element of combination is present which is absent in the second. In each case the contracts were devised with the object of controlling the resale prices

of jobbers and of eliminating all competition between jobbers as to prices. Therefore, the two cases supplement each other, one holding that manufacturers can not combine through a selling agency and the other that a manufacturer can not control the prices on all sales of his products by all dealers at wholesale and retail.

Those cases dispose of this case. They did not involve patented articles and neither does this case.

If the Dr. Miles Medical Co., the manufacturer of the proprietary medicine, had used a patented boiler or other patented article in the process of making the secret compound, and if that fact had appeared in the record, would the decision have been different? Would the Medical Co. thereby have acquired a power to control prices which otherwise it did not possess? Suppose in the Wall Paper case one of the manufacturers had assigned to the selling company a patent on a machine for cutting, drying, or rolling paper, and that the company had then licensed each of the manufacturers to make and use the machine, and had incorporated in the licenses all the restrictions respecting the sale of the output of wall paper which were condemned by this court, would such an arrangement have been lawful?

Under the decision in the proprietary medicine case a manufacturer can not restrain commerce in his own products; it follows that he has no power to restrain the commerce in the products of other manufacturers. He can not license them to do what he can not do him-

self; nor can he do with theirs what he can not do with his own.

The Standard Co., during the time it owned the Arrott patent, could not lawfully have dictated to jobbers the prices at which they should resell the Standard products, which were not patented. So much the Miles Medical Co. case decides. How, then, could the Standard Co. transfer to Wayman a legal right to fix the resale prices not only on its own ware but on the ware of all the other manufacturers?

In the proprietary medicine case, it was conceded by both sides that a vendor of a bottle of patented medicine can not, after title has passed, impose upon the vendee any restraints of alienation by means of conditions governing the resale. In order to evade that well-known rule of the common law the vendor had arranged an elaborate system of so-called "agency contracts," by which he purported to retain title to himself, and to make the wholesale and retail druggists merely his agents. This court brushed aside the device and considered the transaction as a sale. It denounced the entire scheme of contracts devised by the drug company for the reason that it restrained the business of the wholesaler and the business of the retailer, after the title to the property had passed to them.

In the case at bar the restraints were imposed upon the enameled ware, title to which had never been in the licensor. The defendants entirely overlook the fundamental fact in this case, that the restraints substantially and directly affected the sale of enameled

ware, and only indirectly related to the use of the patented article.

We shall not attempt in this brief to review the numerous decisions of this court holding unlawful all combinations obstructing the free flow of interstate commerce, or interfering with the citizen's right to engage in commerce, or suppressing competition in commerce. These propositions are past dispute. For the convenience of court and counsel, we cite the principal decisions under the Sherman Act pertinent here:

Addyston Pipe & Steel Co. v. *U. S.*, 175 U. S., 211.

Trans-Missouri Freight Association v. *U. S.*, 166 U. S., 290.

Joint Traffic Association v. *U. S.*, 171 U. S., 505.

Montague v. *Lowry*, 193 U. S., 38.

Northern Securities Co. et al. v. *U. S.*, 193 U. S., 197.

Swift & Co. v. *U. S.*, 196 U. S., 375.

Bement v. *National Harrow Co.*, 186 U. S., 70.

Shawnee Compress Co. v. *Anderson*, 209 U. S., 423.

Loewe v. *Lawlor*, 208 U. S., 274.

Continental Wall Paper Co. v. *Voight*, 212 U. S., 227.

U. S. v. *Kissell*, 218 U. S., 601.

Dr. Miles Medical Co. v. *Park & Sons*, 220 U. S., 372.

Standard Oil Co. v. *U. S.*, 221 U. S., 1.

American Tobacco Co. v. *U. S.*, 221 U. S., 106.

U. S. v. *St. Louis Terminal Co.*, 224 U. S., 383.

U. S. v. *Dupont de Nemours Co.*, 188 Fed., 127.

Union Castle Mail S. S. Co. (Ltd.) v. *Thomsen et al.*, 190 Fed., 536.

Steele v. *United Fruit Co.*, 190 Fed., 631.

U. S. v. *Standard Sanitary Mfg. Co.*, 191 Fed., 172.

Steers et al. v. *U. S.*, 192 Fed., 1.

II.

THE MONOPOLY OF THE PATENTEE DOES NOT INCLUDE A CONTROL OVER COMMERCE IN AN ARTICLE IN THE MAKING OF WHICH THE PATENTED MACHINE IS USED.

Appellants assert that this case falls without the decisions cited in the last point and that their acts and agreements are lawful under that section of the United States statutes which grants to the inventor "the exclusive right to make, use, and vend the said invention or discovery throughout the United States." Appellants wholly disregard the fundamental fact of this case; the restraints complained of by the Government substantially and directly operate upon commerce in unpatented enameled ware, and only very indirectly and remotely, if at all, relate to the use of the patented article or dredger.

It was competition in commerce in unpatented bathtubs which appellants destroyed, and upon persons engaged in commerce in that ware they imposed

their unreasonable restraints. The prices established for the manufacturers, the resale prices made effective in resales by the jobbers, the prohibitions against the manufacturers selling to jobbers who had not signed, and against jobbers buying from independent manufacturers, the provisions enabling Wayman to audit the books of manufacturers and jobbers, the powers and duties of the price commission, all related to and were restraints upon commerce in unpatented articles. Not one of these restrictions concerned even remotely the price of patented dredgers or commerce in dredgers.

Appellant's counsel argue that the owner of a patent in licensing the use of his invention may attach conditions to the licensed use. This we grant (*Dick* v. *Henry*, 224 U. S., 1). There the court said (p. 24):

> The property right to a patented machine may pass to a purchaser with no right of use, or with only the right to use in a specified way, or at a specified place, or for a specified purpose.

But under the Dick decision restraints so imposed must be "legal and reasonable conditions," attached to the use of the patented article. They must be restrictions "not inherently violative of some substantive law." Mr. Justice Lurton said (p. 26):

> Where, then, is the line between a lawful and an unlawful qualification upon the use? This is a question of statutory construction.

It was upon this question that this court divided in the Dick case, the dissenting opinion holding that the restriction there under consideration was a restriction concerning the use of materials and not a restriction upon the use of the machine protected by the patent law. Mr. Chief Justice White said (p. 52):

> As the right to employ any desired operative materials in using the patented machine was not a right derived from or protected by the patent law, but was a mere right arising from the ownership of property, it can not be said that the restriction concerning the use of the materials was a restriction upon the use of the machine protected by the patent law. When I say "it can not be said," I mean it can not be so done in reason, since the inevitable result of so doing would be to declare that the patent protected a use which it did not embrace. And this, after all, serves to demonstrate that it is a misconception to qualify the restriction as one on the use of the machine, when in truth, both in form and substance *it was a restriction upon the use of materials* capable of being employed in operating the machine. (Italics ours.)

In the case at bar the restrictions in the first place were not reasonable and legal conditions attached to the use of the patented machine, for they restrained trade and promoted monopolization of commerce in articles not patented. In the second place, the restrictions were not attached to the use of the patented tool, but applied to acts *subsequent to the use;* that is, to what was done *after* the use of the tool em-

bodying the invention. The restraints were laid upon the distribution of and commerce in ware in the making of which the tool was used. It is not proper to speak of the ware as the product of the patented dredger. It would be as exact to speak of it as the product of the furnace, or the product of the enameling powder or the slush coat. Many processes and factors enter into the making of the ware. It is no more the product of the dredger than it is the product of any one of these processes and factors.

Not one of the unlawful conditions contained in the so-called license agreements was operative before or was coincident with the use of the dredger. All became effective subsequent to the use. In the Dick case, the restriction merely provided that in the use of the mimeograph the only paper used should be paper which had been supplied by the patentee. Therefore the condition became effective at the time of use of the patented article. There was no attempt to control the output of the mimeograph, or to fix the price at which the users of the mimeograph should sell the mimeographed copies.

Breach of the conditions in the Wayman licenses could occur only after the use of the patented Arrott dredger, for those conditions applied solely to acts performed after the use. Acts in interstate commerce subsequent to the use are not related to the use and accordingly conditions attached to those subsequent acts do not qualify the use. Therefore it is clear that sales to non licensed jobbers or at prices different from the estab-

lished prices do not in any sense constitute a use of the invention in a "prohibited way," but are, in fact, violations of those terms of the contracts which apply to the disposition of non patented articles. Can it in reason be argued that such sales subject the manufacturer or the jobber to an infringement suit by Wayman under the Arrott patent?

It is immaterial whether or not the patented tool is essential in producing the enamel ware for in any event no restriction laid upon the distribution of the ware in commerce can relate back so as to qualify even remotely the use of that tool during the manufacture of the ware.

The license agreement sustained by the Dick decision created no monopoly in unpatented things, for it left the whole world free to manufacture and sell paper and ink. It reserved to the patentee the sole right to supply specified unpatented articles to specified persons, but it did not prevent any other persons manufacturing and distributing those unpatented articles generally to all except to those who had bought the patented mimeograph. It gave to no one control either over the source of supply of the unpatented articles or over the demand for those articles, except in respect to the person who bought the patented mimeograph. As to him only was the market curtailed and the demand controlled.

On the other hand, in the case at bar the direct object of the appellants was to monopolize commerce in articles unpatented and of universal use. The

combination directly affected and absolutely controlled every phase of that commerce. It not only dictated the prices on sales from the manufacturers to the jobbers and every term and condition applicable to those sales, but also regulated in the same detail the sales of the jobbers to the plumbers. Moreover, every restriction contained in the agreements has been cruelly and oppressively enforced and maintained.

The language of Mr. Justice Lurton in the Continental Wall Paper case is peculiarly appropriate here (148 Fed., 939, 947):

> A more complete monopoly in an article of universal use has probably never been brought about. It may be that the wit of man may yet devise a more complete scheme to accomplish the stifling of competition. But none of the shifts resorted to for suppressing freedom of commerce and securing undue prices, shown by the reported cases, is half so complete in its details. None of the schemes with which this may be compared is more certain in results, more widespread in its operation, and more evil in its purposes.

A brief analysis of the contracts will prove how preposterous is the claim that the license agreements establish only such relations between the licensor and the licensee as are authorized by the patent laws.

The language of the license grant reads (Ex. 9, II, 20):

> The licensor hereby grants to the licensee, subject to the provisions hereinafter contained,

> a nonexclusive license to practice in the manufacture of sanitary enameled iron ware the processes patented in said several patents, to make and use in such manufacture the machines and devices patented in said patents, and to use and sell the goods so made.

The terms of this grant are much broader than the authority of the licensor. He has tried to convey what is not his to convey. Wayman's authority must be determined by the language of the letters patent. (Ex. 134 to 136, II, 189–205). The specification forming part of the letters patent issued to Arrott states (II, 190):

> This invention has relation to articles used for sifting and distributing powdered enameling material on the surface of bath tubs and other vessels, commonly known to the trade as "dredgers."

The inventor describes what is new as follows (II, 192):

> A dredger or sifter consisting of a screen or sieve and a supporting handle in combination with a pneumatic agitator attached to the dredger and adapted to vibrate the sieve, substantially as described.

The Dithridge and Lindsay patents relate to the same kind of tools, the first being a patent on a "pneumatic sieve" (II, 194) and the second a patent on an "enameling powder distributor" (II, 201).

Wayman incorporated in the license and purported to grant what was not his to convey. He did not own any patented processes, and therefore could

not grant a "nonexclusive license to practice in the manufacture of sanitary enameled iron ware the processes patented in said several patents." Wayman's patent was on a machine; it was not a patent on a process. (*Corning* v. *Burden*, 15 How., 252, 267; *Cochran* v. *Deever*, 94 U. S., 780, 787; *Burr* v. *Duryee*, 1 Wall., 531, 570; Telephone cases, 126 U. S., 1, 532–534; see also testimony of defendants' witness, E. M. Bentley, on cross examination, III, 374, fols. 3–4, and the Arrott specification forming part of the Letters Patent Ex. 134, II, 189–192).

Furthermore, the clause quoted above grants the manufacturer the right to make and use the machines and devices patented in said patents, "*and to use and sell the goods so made.*" "The goods so made," of course, are the sanitary enameled ware, and not the patented dredgers. Here again the drawer of the contract incorporated in the license and attempted to convey something which does not come within the domain of the patentee, for a patentee who grants a license to make and use the patented machine has no control, by virtue of his patent, over the article made with the help of the patented machine. This is a fundamental principle of patent law. (*Keplinger* v. *De Young*, 10 Wheat., 358; *Merrill* v. *Yeomans*, 94 U. S., 568.) By incorporating in the license agreement the grant of a right "to use and sell the goods so made," Wayman acquired no authority to dictate the prices at which the ware should be sold. By purporting to convey what was not his to convey, he

gained no authority which otherwise he would not have had.

It was to this ostensible grant of a right "to use and sell the goods so made" that Wayman attached the restraints which were the occasion of this action. Those restraints operated upon and obstructed commerce in the "goods so made."

This analysis of the license grant reduces the license to a right to "make and use in such manufacture the machines and devices patented in said patents." Every other word in the granting clause is meaningless.

The attempt to convey what the grantor had no title to convey was further carried out in the jobbers' license agreement and the price list. After reciting that the manufacturer was licensed under the three dredger patents which are enumerated, the jobbers' agreement between the manufacturer and jobber (Ex. 11, II, 32) continued:

> Whereas the purchaser desires to purchase from the company sanitary enameled iron ware embodying or made in accordance with such inventions and to obtain licenses to sell such ware to others, and the company is willing to sell sanitary enameled iron ware to the purchaser and license it for resale on the following terms and conditions, * * * etc.

Here in the first place it was stated that the jobber desired to purchase ware "embodying or made in accordance with said inventions." This language was purposely misleading, and to one who did not

understand the manner of manufacture gave the impression that it was the article embodying the invention that the jobber was buying, rather than the article made with the help of the patented machine. It should also be noted that the language contemplated a transfer of title of the ware from the manufacturer to the jobber, and yet the jobber, after he had purchased the ware, desired "to obtain licenses to sell such ware to others." This was a contradiction of terms. After the manufacturer had passed title, he had transferred all control over the property; a jobber had the right of resale, independently of any additional attempted transfer by the manufacturer, who had already sold all he had to sell.

Throughout this jobbers' license agreement the transaction between the manufacturer and jobber is referred to as a sale. The clause above quoted states: "The company is willing to *sell* sanitary enameled ironware to the purchaser and to *license it for resale* on the following terms." The next paragraph of the contract provides: "The company agrees to *sell* and the purchaser agrees to *buy*," etc. (II, 32.)

The clause relating to deliveries (II, 32) states: "Goods will be *sold* to the purchaser." Throughout the contract the jobber is called the *purchaser*. This case, therefore, is on all fours with the Miles medical decision, 220 U. S., 373. In that case, in order to evade the well-known rule of the common law that the vendor may not impose any restraints

of alienation upon the vendee after title has passed, the vendor had drawn up an elaborate system of so-called agency contracts, by which he purported to retain title in himself and to make the wholesale and retail druggists merely his agents. In this case the manufacturer uses the term "jobbers' license agreement" and attempts to convey the impression that the restraints have been imposed by a patentee instead of by the manufacturer.

The price list adopted by the defendants carries out and completes the misrepresentation as to the patents and patentability of the article sold. Like the manufacturers' and jobbers' license agreement, it abounds in terms of the patent law incorrectly used, plainly for the purpose of hoodwinking the buyer into believing that he is buying a patented article. "Licensed sanitary enameled iron ware," "patented automatic enameling processes," "licensed companies," "patented processes," "licensed label," "licensed ware," "patented," "this fixture is manufactured in accordance with the following United States letters patent," are some of the terms appearing on the cover and first page of the price list, which are also decorated with the numbers of the three patents conspicuously displayed (II, 74–75).

The placing of a label upon the enameled ware containing a notice that the "licensed ware" is "patented" (see II, 75) constitutes a violation of sec. 4901, U. S. Revised Statutes, which gives a *qui tam* action against one who has placed upon an unpatented article the word "patent" or any word purporting

that the same is patented, for the purpose of deceiving the public into believing that the article is covered by a patent.

The inventor of the Arrott dredger could not have patented the enameled ware made with the help of his patented dredger, for the ware so made was not new in the sense of the patent law. "New articles of commerce are not patentable as new manufactures, unless it appears in the given case that the production of the new article involved the exercise of invention or discovery *beyond what was necessary to construct the apparatus for its manufacture or production.*" (Mr. Justice Clifford in *Collar Co.* v. *Van Dusen*, 23 Wall., 530, 653, citing authorities.) By what principle of law may the owner of the Arrott patent project his monopoly so as to embrace articles upon which letters patent could never have been issued? Yet in this case he arrogates to himself an authority to dictate the price of an article which he could not have patented and justifies himself by pointing out that he owns something else which is patented.

III.

No word or phrase in the Sherman Antitrust Act reveals an intent to exempt the owners of patents from its sweeping provisions against monopolistic combinations.

We have above pointed out that the unlawful combination of which the United States complain in this case relates to commerce in unpatented articles. No patent question is in fact here involved. The

license arrangement was but a device adopted by the defendants in order to give to the combination the appearance of legality. Only if this court shall hold that unpatented enameled-ware commodities are to be given in commerce all the rights to which patented articles are entitled, because made in part by means of a patented tool, can the question arise for decision whether or not combinations relating to patented articles are exempt from the prohibitions of the Sherman Act.

We contend that the patent laws and the Sherman law are not conflicting, but in their respective domains are mutually exclusive of each other. The Supreme Court of Massachusetts said in a recent opinion by Mr. Chief Justice Rugg (*United Shoe Machinery Company* v. *La Chapelle*, 99 N. E., 289):

> No word or phrase in the Sherman Antitrust Act reveals an intent to exempt the owners of patents from its sweeping provisions against monopolistic combination.

An analysis of the nature of the right conferred by the patent franchise makes this clear.

The right conferred by the patent laws is not the right to make, use, and vend the thing patented, for this right exists by virtue of the common law and independently of the patent statutes; this right to make, use, and sell the patented device is a natural right. The only right which the letters patent grant is the right to exclude all other persons from making, using, or vending the thing patented without the permission of the patentee.

Mr. Chief Justice Taney said, in *Bloomer* v. *McQuewan* (14 Howard, 539, at p. 548):

> The franchise which the patent grants consists altogether in the right to exclude everyone from making, using, or vending the thing patented without the permission of the patentee. That is all that he obtains by the patent.

In *Patterson* v. *Kentucky* (97 U. S., 501) Mr. Justice Harlan used the following language (p. 506):

> The right to sell the Aurora oil was not derived from the letters patent, but it existed and could have been exercised before they were issued, unless it was prohibited by valid local legislation. All which they primarily secure is the exclusive right in the discovery. That is an incorporeal right.

This right to sell a patented article is subject to the police regulations of the State. In *Patterson* v. *Kentucky* (97 U. S., 501, 505), this court upheld a statute of Kentucky which prohibited the sale of patented oil which the State inspector had condemned as unsafe for illuminating purposes. The defendant asserted a right to sell the oil by virtue of his letters patent, but Mr. Justice Harlan said, page 505:

> We are of opinion that the right conferred upon the patentee and his assigns to use and vend the corporeal thing or article, brought into existence by the application of the patented discovery, must be exercised in subordination to the police regulations which the State established by the statute of 1874.

In *Webber* v. *Virginia* (103 U. S., 344, 347), Mr. Justice Field said:

> Congress never intended that the patent laws should displace the police powers of the States, meaning by that term those powers by which the health, good order, peace, and general welfare of the community are promoted. Whatever rights are secured to inventors must be enjoyed in subordination to this general authority of the State over all property within its limits.

In the case of *In re Brosnaham* (18 Fed., 62) the defendant had sold oleomargarine upon which there was a patent, in violation of a law of Missouri prohibiting such sale. Mr. Justice Field, in answer to the argument of defendant that he was protected by his patent rights, said, page 165:

> Suppose a discovery of a cheap mode of producing intoxicating liquor, in regard to which the inventor obtains a patent for the product, does this authorize him to defy the entire system of State legislation for the suppression of the use of such drinks? The answer is that the purposes of the patent law and of the constitutional provision are answered when the patentee is protected against competition in the use of his invention by others; and when the law prevents others from infringing on his exclusive right to make, use, or sell, its object is accomplished. This proposition is fully supported by the Supreme Court in the case of *Patterson* v. *Kentucky* (97 U. S., 501).

In the cases last cited the exercise of the police power of a State in prohibiting the sale of patented articles was held not to be in conflict with the patent laws of Congress. If the State may prohibit altogether the sale of patented articles because of injury resulting from such sale to its citizens, it follows that the State may prohibit the sale of patented articles pursuant to combinations in restraint of intrastate trade and commerce, for such combinations are equally harmful to the public. In the one case the State is prohibiting any sale, in the other case it is merely regulating the sale of the patented article in so far as it declares that no such sale shall be made under any unlawful combination monopolizing or restraining intrastate commerce. In either case the State is exercising its police power to protect its citizens; neither exercise of power conflicts with the patent laws. The reason is clear. The regulation of the State is being applied to natural rights and not to patent rights. The right to sell, a common-law right, is denied by the State in the one case and regulated in the other, the State acting in each case for the good of the public.

In passing the so-called antitrust statutes Congress and a State legislative body act under different sources of power, but in each case the exercise of the power arrives at the same result, namely, prohibition of restraints of trade and of monopolies. The effect of the State act and of the Sherman Act is the same; that is, the two acts relate to and operate upon the same subject matter, although one is enacted under

the police power of the State and the other under the authority of Congress to regulate interstate commerce. If the exercise of the police power of the State does not encroach upon the domain of the patent laws, how can it be said that to include within the operation of the Sherman Act combinations restraining trade is to subtract from the monopoly of the patentee?

Judge Rose says in his opinion in the court below (A. 120):

> A patentee is as much subject to the laws of the land as is any other man. All men know that Congress never intended, when it passed the Sherman Act, to change the patent law. It did not do so. The patentee may, in spite of that law, monopolize for the term of his patent the thing which he or his assignor invented. Neither at common law nor in this country by statute has he ever had a right to monopolize anything else. As to everything not validly claimed in his patent he is as other men. If by the common law or the statutes of the State or by the enactments of Congress men are forbidden to restrain trade or to monopolize it, a patentee may not restrain trade or attempt to monopolize it in anything except that which is covered by his patent.
>
> * * * * *
>
> It does not give a right to the patentee to sell indulgences to violate the law of the land, be it the Sherman Act or another.
>
> * * * * *
>
> A patentee who monopolizes his invention breaks no law. He who uses his property

> right to exclude others from the making, selling, or using his invention for the purpose and with the effect of making a combination to restrain trade in something from which his patent gives him no right to exclude others, does break the law.
>
> * * * * *
>
> He can not use his patent rights to restrain trade in unpatented bathtubs.

In *United Shoe Machinery Co.* v. *LaChappelle* (*supra*) the United Shoe Machinery Company sought to compel an assignment to it of a patent taken out by defendant, who had contracted to assign to the company all patents taken out by him. The defense was that the plaintiff was a consolidation of seven or more previously competing companies controlling 90 to 95 per cent of the shoe-machinery business, and that the contract was in direct aid and furtherance of that monopoly. The Supreme Court of Massachusetts held this to be a valid defense. The question was whether a combination among several patentees of competing devices is within the inhibition of the statute. Rugg, C. J., said (99 N. E., 291):

> The holder of a patent is given an absolute monopoly of the invention covered thereby, not affected in any degree by the Sherman antitrust act. He may refuse to use it, or may use it in part only, or grant its use to others upon conditions, and he may prevent all others from infringing in any way upon the rights thus secured to him. (*Continental*

Paper Bag Co. v. *Eastern Paper Bag Co.*, 210 U. S., 405.) But he is given no immunity from general police regulations. There is nothing inherent in his patent or in the nature of his peculiar privileges, which enables him to be free from general laws enacted for the common good.

* * * * *

The monopoly protected by the patent goes no further than the invention and contractual obligations attached to it. It does not protect other commercial ventures attempted by the owner, even though indirectly or remotely they may relate to the invention.

* * * * *

Conditions and combinations are different in kind. They are distinguishable not in degree but in substance. Conditions annexed by the patentee to the enjoyment of an invention are legal even though resulting in an extended monopoly. Combinations among patentees resulting in an extended monopoly are illegal.

* * * * *

Protection by patent is established by Congress. It is not a constitutional guaranty, but depends wholly on the statutes. An act of Congress directed against evils which were assumed to arise from the monopolistic combination of those engaged in interstate commerce comes from the same source and carries the same obligations of enforcement as do the patent laws. No word or phrase in the Sherman antitrust act reveals an intent to

> exempt the owners of patents from its sweeping provisions against monopolistic combination. We are unable to perceive any underlying reason for supposing that by implication growing out of economic or business conditions such an exemption was intended. There appears to be no inherent natural distinction between owners of patents and owners of oil which would justify the application of the statute to one and not to the other. The conclusion seems to follow that the comprehensive condemnation of the act against every person who monopolizes interstate commerce by combination with others includes holders of patents as well as others.

By means of their combination, the appellants brought under one ownership three competing patents relating to automatic dredgers; those were the only automatic dredgers on the market. This act of itself was a violation of the Sherman law.

Blount Mfg. Co. v. *Yale & Towne Mfg. Co.*, (166 Fed., 555).

Strait v. *National Harrow Co.* (18 N. Y. Sup., 224).

National Harrow Co. v. *Quick* (67 Fed., 130).

National Harrow Co. v. *Hench* (76 Fed., 667).

National Harrow Co. v. *Hench* (83 Fed., 36).

National Harrow Co. v. *Hench* (84 Fed., 226).

National Harrow Co. v. *Hench* (85 Fed., 991).

Bement v. *National Harrow Co.* (186 U. S., 70).

Vulcan Powder Co. v. *Powder Co.* (96 Cal., 510).

Gamewell v. *Crane* (160 Mass., 50).

Page on Contracts (vol. 1, 445).

In *Blount Mfg. Co.* v. *Yale & Towne Co.*, the manufacturers of patented liquid door checks eliminated competition by means of a tripartite agreement. In an action brought on the agreement by one manufacturer against another, the illegality of the contract was set up as a defense. District Judge Brown said (p. 557):

> A contract whereby the manufacturers of two independent patented inventions agree not to compete in the same commercial field deprives the public of the benefits of competition, and creates a restraint of trade which results, not from the granting of letters patent, but from agreement. While the monopoly of the patented article is not increased, the monopoly of the commercial field is increased by the "unified tactics" as to prices.
>
> * * * * *
>
> Where, however, each patentee continues to make his own goods under his own patents, and seeks to enhance his profits by an agreement with competitors, who make either patented or unpatented articles, then it seems to follow that the agreement of each to restrain his own trade can not be regarded merely as an incident to the assignment of patent rights. The patentee then restrains his own trade, not

for the purpose of enhancing the value of the license which he grants, but for the purpose of enhancing the value of his trade by removing competition.

* * * * *

The proposition that an agreement not to manufacture or to restrain trade is within some rights of nonuse conferred upon a patentee seems unsound, if we consider the nature of the grant of letters patent. The right of the patentee or of his assignee to withhold the invention is quite apart from any grant contained in the letters patent. The privilege of restraining others is granted to the owner of letters patent. He is given no right or privilege to restrain himself. By the terms of the patent he has the exclusive right to make, use, and vend. The right to make, use, and vend he has without the grant of letters patent. When we say that a patent grants an "exclusive right," we do not mean that the right to make, use, and vend is granted, but only that the patentee's existing right is made exclusive by the grant (p. 558).

After citing the *Paper Bag patent case* (210 U. S., 424) and *Bloomer* v. *McQuewan* (14 How., 549), he continues (p. 559):

The right of a patentee to suppress his own rests upon ordinary considerations of property right. The public has no right to compel the use of patented devices or of unpatented devices when that is inconsistent with fundamental rules of property. When a patentee agrees, however, to restrain his own trade in

> the article of his own invention, not as an incident to a granting of rights but for the purpose of enhancing his price by the removal of competitors, he is then quite outside the sphere of any right granted to him by the Government. He may engage in interstate trade or not, as he pleases; but, being engaged in that trade he is subject to all restrictions upon interstate traders.

And in conclusion he says, on page 562:

> Combinations between owners of independent patents, whereby, as part of a plan to monopolize the commercial field, competition is eliminated, are within the Sherman Act, for the reason that the restraint of trade or monopoly arises from combination, and not from the exercise of rights granted by letters patent.

National Harrow Co. v. *Hench* (83 Fed., 36) was a decision by the Circuit Court of Appeals of the Third Circuit. In that case the manufacturers of float spring tooth harrows assigned all their patents to the National Harrow Co., immediately taking out licenses to manufacture and sell at fixed prices. On an action to recover royalties, the court held the arrangement unlawful, stating (p. 38):

> Patents confer a monopoly as respects the property covered by them, but they confer no right upon the owners of several distinct patents to combine for the purpose of restraining competition and trade. Patented property does not differ in this respect from any other. The fact that one patentee may possess himself

> of several patents, and thus increase his monopoly, affords no support for an argument in favor of a combination by several distinct owners of such property to restrain manufacture, control sales, and enhance prices. Such combinations are conspiracies against the public interests and abuses of patent privileges. The object of these privileges is to promote the public benefit, as well as to reward inventors. The suggestion that the contract is justified by the situation of the parties—their exposure to litigation—is entitled to no greater weight. Patentees may compose their differences, as the owners of other property may, but they can not make the occasion an excuse or cloak for the creation of monopolies to the public disadvantage.

In a case with the same title, reported in 84 Fed., 226, District Judge Cox said of the same combination:

> The complainant was created solely to effectuate the purpose of the combination, the patent in suit being transferred as part of the unlawful scheme.

In the case reported in 76 Fed., 667, Circuit Judge Acheson said (p. 669):

> It is true that a patentee has the exclusive control of his invention during the life of the patent. He may practice the invention or not, as he sees fit, and he may grant to others licenses upon his own terms. But where, as was the case here, a large number of independent manufacturing concerns are engaged in making and selling, under different patents and in various forms, an extensively used

> article, competition between them is the natural and inevitable result, and thereby the public interest is promoted. Therefore a combination between such manufacturers which imposes a widespread restraint upon the trade and destroys competition is as injurious to the community and as obnoxious to sound public policy as if the confederates were dealing in unpatented articles.

Bement v. *National Harrow Co.* (186 U. S., 70) was an action brought in the New York State Supreme Court to recover royalties. The plaintiff, although having the same name, was not the company mentioned in the cases last cited. The defendant set up that the license entered into by him was but one of many licenses issued by the plaintiff to all the manufacturers. The referee, however, did not find that any licenses or contracts other than those between the parties to the suit had been entered into, and therefore the single question before the Supreme Court was whether the licensor could lawfully establish, for observance by the licensee, the prices at which the patented article was to be sold in interstate commerce. This court pointed out in its opinion a number of times that the question of combination between the manufacturers was not before it, saying (p. 85):

> The omission of the referee to find from the evidence that the contracts A and B were a continuation of former contracts held to have been void, and that there were in fact other manufacturers of harrows who had entered

into the same kind of contracts with plaintiff as those denominated A and B, and that there was a general combination among the dealers in patented harrows to regulate the sale and prices of such harrows, furnishes no ground for this court to assume such facts. The contracts A and B are to be judged by their own contents alone and construed accordingly.

The appellants rely upon the following cases:

United States Consolidated Seeded Raisin Co. v. *Griffin & Skelly Co.* (126 Fed., 364).

Rubber Tire Wheel Co. v. *Milwaukee Rubber Tire Works* (142 Fed., 531; 154 Fed., 358).

Indiana Mfg. Co. v. *Case Threshing Machine Co.* (148 Fed., 21; 154 Fed., 365).

In the Raisin case the plaintiff owned patents covering machines for seeding raisins and had licensed the defendants and others to use the machines, subject to a royalty measured by the number of pounds of raisins seeded. There was no attempt to control the price of raisins in interstate commerce. Therefore the decision is inapplicable here.

In the Threshing Machinery case the court was considering patents on pneumatic straw stackers owned by the plaintiff, which had licensed the defendant and others to manufacture the stackers and sell them at fixed prices. The pneumatic straw stacker enabled the farmer to stack the straw by machinery instead of by hand. If the licensor had attempted to fix the price at which the stacks of straw were sold, after stacking, the case would be parallel to this case. Furthermore, there was no

evidence of any combination between the manufacturers to frame uniform licenses.

The Rubber Tire cases, like the decision last cited, dealt with prices fixed upon a patented article, a rubber tire manufactured under the patent of Grant, "who had produced a new integer in the useful arts." The decision is clearly wrong and contrary to the decisions above cited in the Yale & Towne and National Harrow cases; in any event it is no authority in the case at bar, because the restraints related to patented articles.

The appellants also rely upon two groups of cases, the first sustaining restrictions imposed upon the use of a patented machine and the second upholding conditions imposed by the patentee-vendor, fixing the resale prices and other terms of resale of the article covered by the patent.

Under the first group may be cited *Dick* v. *Henry* (*supra*) decided since the decision below was rendered, *Heaton Peninsular Button Fastener Co.* v. *Eureka Specialty Co.* (77 Fed., 288; 65 Fed., 619); *Cortelyou* v. *Lowe* (111 Fed., 1005; 114 Fed., 1021); *Cortelyou* v. *Carter's Ink Co.* (118 Fed., 1022); *Broderick Copygraph Co.* v. *Roper* (124 Fed., 1019); *Mayhew* v. *Broderick Copygraph Co.* (137 Fed., 596; 131 Fed., 92); *Cortelyou* v. *Johnson* (138 Fed., 119; 145 Fed., 932; 207 U. S., 196); *Tubular Rivet Co.* v. *O'Brien* (93 Fed., 200); *Rupp* v. *Elliott* (131 Fed., 730).

The second group includes *Edison Phonograph Co.* v. *Kauffman* (105 Fed., 960); *Edison Phonograph*

Co. v. *Pike* (116 Fed., 863); *Victor Talking Machine Co.* v. *The Fair* (123 Fed., 424); *National Phonograph Co.* v. *Schlegel* (128 Fed., 733, reversing 117 Fed., 624); *Ingersoll* v. *Snellenburg* (147 Fed., 522); *New Jersey Patent Co.* v. *Schaeffer* (159 Fed., 171).

None of the cases in either of the above groups is applicable for the reason that no question of combination under the Sherman Antitrust Act was involved in those cases. Each of them involved conditions attached to the use or sale of patented articles. None of the conditions had been arrived at by a combination of competing manufacturers in order to suppress competition between them.

IV.

The Lower Court Rightly Refused to Extend the Time of Appellants to Take Testimony.

Whether appellants were entitled to further time for the taking of testimony was a matter resting in the discretion of the lower court.

It is manifest that the appellants had ample opportunity to present evidence. The taking of testimony by the petitioner commenced October 31, 1910 (I, 3), and ended December 22, 1910 (I, 530, 573).

The appellants had from December 22, 1910, until and including April 22, 1911. (IV, 154, 244.)

The Government's rebuttal occupied only one day (April 24, 1912). (IV, 245.)

The fact that after December 6, 1911, an indictment was pending against the corporation defendants

and many of the individual defendants for the same transactions furnished no reason for postponing the taking of testimony in the civil suit.

The Sherman Act provides four remedies, as follows:

1. A criminal proceeding to punish those guilty of violating the act (sec. 1, 26 Stat., 209).

2. A suit in equity to prevent and restrain violations (sec. 4).

3. Forfeiture of any property owned under any combination and in course of transportation from one State to another (sec. 6).

4. An action in treble damages to be brought by any person injured by reason of anything forbidden by act (sec. 7).

The lower court rightly held that the wisdom of the law and the effect of rigid enforcement are not matters for consideration by the court, but by other departments of the Government. This court has said (*Armour Packing Co.* v. *U. S.*, 209 U. S., 56, 82):

> It is the province of the judiciary to enforce the laws constitutionally enacted, not to make them to suit their own views of propriety or justice.

The summoning as witnesses of individual defendants by the defendant Colwell Lead Company was a scheme invented by counsel for the appellants and deliberately adopted for the purpose and with the hope of securing immunity for the individual defendants so called. Under the circumstances it was the duty of counsel for the United States to

notify such witnesses that if they testified they could not thereafter claim immunity, and that therefore they were entitled, relying upon the fifth amendment, to refuse to answer such questions as would incriminate them. (Wigmore on Evidence, Vol. III, sec. 2269.)

The Colwell Lead Company was not prejudiced by the refusal of the witnesses to answer. The questions were not asked in good faith by counsel for the Colwell Lead Company, but solely for the purpose of giving the defendants an opportunity of testifying so that they might claim immunity in the criminal proceeding. See the opinions of Judges Holland and Denison upon the immunity questions referred to in appellant's brief. (*U. S.* v. *Standard San. Mfg. Co.*, 187 Fed., 257; *Same* v. *Same*, 187 Fed., 232.)

The following defendants were summoned by the Colwell Lead Company:

Theodore Ahrens, president of the Standard Sanitary Manufacturing Company (III, 460).

Edwin L. Dawes, second vice president and general manager of the Standard Sanitary Manufacturing Company (III, 471).

George W. Franzheim, formerly connected with the Wheeling Sanitary Manufacturing Company as secretary and treasurer (III, 514).

Howard T. Gates, secretary of the McCrum Howell Company (III, 445).

Max Goebel, secretary J. L. Mott Iron Works (III, 427).

Lloyd G. McCrum, president of the McCrum Howell Company (III, 436).

William A. Myler, secretary and treasurer of the Standard Sanitary Manufacturing Company (III, 519).

Francis J. Torrance, vice president of the Standard Sanitary Manufacturing Company (III, 452).

Alexander C. Walker, secretary and treasurer of the McVay-Walker Company (III, 490).

Thomas Walker, president McVay-Walker Company (III, 481).

Anton Weiskittel, president Weiskittel Sons Company (III, 504).

No question material to the defense of the Colwell Company was addressed to those witnesses by the counsel for that company. Cooperating with their own counsel, he was seeking only to gain immunity for them.

V.

For the reasons stated, we respectfully submit that the decree below should be affirmed.

GEORGE W. WICKERSHAM,
Attorney General.

EDWIN P. GROSVENOR,
Special Assistant to the Attorney General.

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